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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

COUNTY OF CONTRA COSTA, *Petitioner,*

v.

DALE H. VISNESS, *Respondent,*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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88 pp

QUESTION PRESENTED

May a noncustodial parent whose children have received AFDC receive a bankruptcy discharge from his obligation under federal and state law to reimburse the county for aid paid for the children before a support order was obtained for them?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. _____

COUNTY OF CONTRA COSTA, *Petitioner*,

v.

DALE H. VISNESS, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner County of Contra Costa, a political subdivision of the State of California, hereby respectfully requests this Court to issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit filed on June 12, 1995, reh. den. July 25, 1995.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in *In re Visness*, 57 F.3d 775 (9th Cir. 1995), is reproduced in the Appendix (hereinafter "App.") at 1. The opinion of the United States District Court for the Northern District of California is reproduced in the Appendix at 41.

STATEMENT OF JURISDICTION

On June 12, 1995, the United States Court of Appeals for the Ninth Circuit issued its opinion upholding the District Court's judgment for respondent. App. 1. Petitioner timely filed a Petition for Rehearing with Suggestion for Rehearing En Banc. On July 25, 1995, the Court of Appeals denied the petition. App. 40. This Court has jurisdiction to review, by way of writ of certiorari, the judgment or decree of the Court of Appeals, pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONS, STATUTES OR REGULATIONS

Relevant court decisions, statutes and regulations are reproduced in the Appendix at 56 through 77.

STATEMENT OF THE CASE

Background:

A debtor who files a bankruptcy petition is usually entitled to discharge of his pre-petition debts. Congress has provided, however, that certain types of debt are not dischargeable. One type is a debt owed "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child." 11 U.S.C. § 523 (a)(5). App. 61. If the support debt has been assigned to another entity, it remains dischargeable, **unless** the assignment was pursuant to 42 U.S.C. § 602. App. 61-62.

Under section 602 (a)(26), in order to participate in the federally funded AFDC (Aid to Families With Dependent Children) program, a state cannot grant aid to an applicant unless he/she assigns to the state any support rights which have accrued to him or her on the date of the assignment. Under 42 U.S.C. § 656 (a), the assigned support rights "constitute an obligation owed to such State by the individual responsible for providing such support." The same statute further defines the amount of that obligation as either 1) "the amount specified in a court order," or 2) "if there is no court order, an amount determined by the State in accordance with a formula approved by the Secretary." And, under 42 U.S.C. § 656 (b), "[a] debt which is a child support obligation assigned to a State under section 602 (a)(26) . . . is not released by a discharge in bankruptcy." App. 63-64.

In response, California has enacted Cal. Welf. & Inst. Code § 11477 (a), which requires an AFDC applicant to assign to the state, on behalf of herself and those on whose behalf she is applying for aid, all accrued

support rights. App. 76. Cal. Welf. & Inst. Code section 11350 gives a county a cause of action against a noncustodial parent for the amount of AFDC aid paid to the family during the period of separation. App. 72-73.

Summary Of This Case:

When this case arose, Bernadette and Dale Visness had three children. The couple separated, with Bernadette becoming the custodial and Dale the noncustodial parent. For two months in 1984, and for the two and one-half years between March 1, 1985 to September 30, 1987, Bernadette received AFDC for the three children. As required by the above statutes, when Bernadette applied for aid, she assigned her accrued support rights to the county. During the above period, Bernadette did not have a judgment of marital dissolution or court order for support or separate maintenance, and there was no settlement agreement in existence.

Pursuant to Cal. Welf. & Inst. Code § 11350 and 11350.1, App. 72, 76, Contra Costa County eventually found and sued Dale to establish paternity, establish ongoing child support payments, and obtain reimbursement for the AFDC already paid on behalf of the Visness children. In November, 1987, Dale stipulated to paternity, to current child support of $332 per month, and $68 monthly to reimburse the County for the $9,463 AFDC already paid.

Dale made no payments on the reimbursement portion of the judgment. In July 1992, Dale filed a Chapter 7 bankruptcy petition. He listed Contra Costa County as a creditor, and filed a complaint in the bankruptcy court to determine the dischargeability of the AFDC reimbursement judgment. In February 1993, the bankruptcy court denied the county's motion for

summary judgment and held that the debt for reimbursement of AFDC paid before issuance of the support order was a dischargeable debt.

The county appealed to the United States District Court. In January 1993 the Hon. Vaughn Walker also ruled that the debt was dischargeable, under the rule earlier established in *In re Ramirez*, 795 F.2d 1494 (Ninth Cir. 1986), *cert. den.* 481 U.S. 1003 (1987).

The county then appealed to the Ninth Circuit Court of Appeals. The county asserted that the Ninth Circuit was not bound by principles of stare decisis, because the *Ramirez* decision had been undermined by subsequent amendments to the bankruptcy code, i.e., 11 U.S.C. § 523 (a)(5). The County also urged that the *Ramirez* court had failed to recognize the child's support right under state law, which accrues at conception and is independent of the custodial parent's support right. The County further contended that the *Ramirez* rule conflicted in principle with decisional law in other circuits, that it abetted both welfare fraud and misuse of the bankruptcy remedy, and that in framing the AFDC and bankruptcy statutes, congress had not intended to make debts such as Dale's dischargeable.

The Ninth Circuit avoided most of the County's arguments. Instead, it merely reaffirmed *Ramirez*, which rested on that court's perception, continued in *Visness*, that **under California law, neither a parent nor a child has any accrued right to support from a noncustodial parent until a court order establishing that support duty comes into being.** If this be so, then the County is not performing absent parent's duty when, in the absence of a court order against him, it pays out AFDC for the support of his children. Rather, the County is performing only its own original statutory duty, and the resulting debt is an original, legislatively-created obligation which runs straight from absent parent to

county, and which is unrelated to the assignment of support rights given by the custodial parent. **The AFDC reimbursement debt is only an ordinary civil debt which is not within 42 U.S.C. section 602 (a)(26) and 11 U.S.C. § 523 (a), and which, therefore, remains dischargeable in bankruptcy.** The County vigorously disagrees.

REASONS FOR GRANTING THE PETITION

I.

REVIEW IS NECESSARY BECAUSE THE OPINION PERPETUATES A CONFLICT OF LAW AMONG THE CIRCUIT COURTS OF APPEALS WHILE CAUSING EXTREME FINANCIAL HARM TO COUNTIES.

In re Visness perpetuates the conflict among the circuits established by *In re Ramirez, supra.* Both cases expressly conflict with *In re Stovall*, 721 F.2d 1133 (7th Cir. 1983). App. 56.

Stovall held that a debt which is a child support obligation assigned to a State when welfare is granted is not dischargeable in bankruptcy. As in *Ramirez* and *Visness*, the Stovalls separated in 1974 and mother then received AFDC for the couple's children from the state of Illinois. No child support order existed until the Stovalls were divorced in 1975. Mr. Stovall was ordered to pay $80 total weekly child support for four children. Mrs. Stovall continued on AFDC. Mr. Stovall accumulated arrearages under the support order and in 1982 declared bankruptcy. He then owed $16,690 under the support order, and the state had paid out $24,000 in welfare benefits for his children. Stovall conceded, as did Mr. Visness here, that the post-order arrearages were not dischargeable. However, he sought discharge of the AFDC reimbursement amount accrued before the 1975 court order for support, arguing that the language of 42 U.S.C. § 602 (a)(26) (see App. 63) referred only to actual moneys which were due to the aid recipient (i.e., reduced to judgment) and which had accrued at the time of the assignment. 721 F.2d at 1134-1135. App. 58.

The Court of Appeals for the Seventh Circuit disagreed, finding no congressional intent to limit liability under the assignment of support rights to amounts reduced to judgment and in arrears at the time of the assignment. In making support obligations nondischargeable, congress "focused on the **whole obligation of support** which the parent owes to the child." Id. at 1135, emphasis added, App. 60.

The facts of *Stovall* are indistinguishable from *Ramirez* and *Visness*. The conflict of law created and maintained by the Ninth Circuit opinions results in disparate treatment of debtors, even when the debtors are similarly obligated to their children under the laws of their respective states. The disparate treatment is financially harmful to California counties in that it puts millions of dollars of AFDC reimbursement judgments at risk of uncollectibility. *Visness* also aids and abets the absent parent who succeeds in keeping his whereabouts officially unknown for some time after separating from his/her children and who permits those children to subsist on welfare aid while he or she is able to pay child support.[1/] When the absent parent is finally found and sued by the county, he may escape his statutory and moral reimbursement duty by declaring bankruptcy.

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1. And who may actually be paying "something," in cash or in kind, "under the table" to custodial parent.

II.

THE VISNESS OPINION IS AT ODDS WITH THE MAJORITY OF CALIFORNIA STATUTORY AND DECISIONAL LAW.

In California, "support" is defined in Family Code section 150, formerly Civil Code section 4390 (h), as "a support obligation owing on behalf of a child, spouse, or family or **an amount owing pursuant to section 11350 of the Welfare and Institutions Code. . . .**" App. 67. The *Visness* analysis either overlooked or declined to recognize this definition.

Visness elaborated on the *Ramirez* analysis of the parental duty of support, and in so doing, affirmed a fundamental error. In *Ramirez,* the panel[2/] relied heavily on *In re Marriage of O'Connell* 80 Cal.App.3d 849, 146 Cal.Rptr. 26, 30 (1978), which stated that "absent a dissolution degree ordering support payments, the parent with custody bears full responsibility for the support of the child." *Id.* at p. 855. *O'Connell* applied former Cal. Civil Code section 208, now Family Code section 3951, para. (a):

> "A parent is not bound to compensate the **other parent**, or a relative, for the voluntary support of the parent's child, without an agreement for compensation." (Emphasis added.) App. 67-68.

Petitioner does not challenge this basic statutory principle. The point is that it does not apply to this case. Had Mmes. Ramirez and Visness not needed

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2. Tang, Ferguson, and Gray, JJ. Judge Ferguson dissented.

county aid to support their children, but had paid the family's expenses from their own funds, they could not then have forced the children's respective fathers to reimburse them for any portion of those expenses incurred before they filed an action for support. See Cal. Fam. Code, section 4009. App. 70. In the absence of proof to the contrary (e.g., an application for aid which establishes need), it is assumed that custodial parents fulfill their legal and moral responsibilities with or without the assistance of the noncustodial parent. If custodial parent does not seek assistance (in the form of a support order or county aid), she is presumed not to need or want it and cannot later demand repayment.

However, the custodial parent in *Visness* was not financially independent. When a custodial parent "goes on the record" with a statement of need, she and the absent parent move into a separate legal category. The third subsection of former Civil Code section 208, now Family Code section 3951 (c), leaves no room for doubt:

> "Nothing in this section relieves a parent of the obligation to support a child during any period in which the state, county, or other governmental entity provides support for the child.") App. 68.

This statute could not be more clear -- whatever his duty in other circumstances, when a child receives support, i.e., aid, from the county, the parent does have an obligation of support for that period. That obligation, which has already been met by the county, must be repaid to the county.

When this case arose, former Cal. Civil Code section 248 provided in part that:

> ". . . Whenever the county furnishes support to an obligee, it has the same right as the obligee to whom the support was furnished, for the purpose of securing reimbursement and of obtaining continuing support. . . ."[2/] App. 69.

Equally clearly, if the custodial parent does not accept county aid, but simply brings an action for child support (privately or via the district attorney[4/]), the support order is retroactive to the date of the filing of the motion or order to show cause, i.e., the date custodial parent formally announces that he or she is not able to meet the child's needs and that the other parent's responsibility must be enforced. Cal. Fam. Code § 4009. App. 70. It is the date of the earlier declaration, whether that be the date eligibility for AFDC is established,[5/] or the date of bringing of an action for support, which is also the date of commencement of absent parent's support liability. Whether payable directly to the custodial parent, or repayable to the county, the obligation is for child support and thus may not be discharged in bankruptcy.

The clearest caselaw statement of this principle is found in *City and County of San Francisco v. Thompson*

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3. Now Cal. Fam. Code section 4002 (b): "If the county furnishes support to a child, the county has the same right as the child to secure reimbursement and obtain continuing support." The term "obligee" has been changed to "child."

4. In California, pursuant to Welf. & Inst. Code sections 11350.1 and 11475.1. App. 75-76.

5. Limited by the three-year statute of limitations period, established by Cal. Code of Civil Procedure section 338, subd. 1, and *Amie v. Superior Court*, 99 Cal.App.3d 421 at pp. 425-426, 160 Cal.Rptr.3d 271 (1979).

172 Cal.App.3d 652, 218 Cal.Rptr. 445 (1985).[6] In that case, absent parent challenged the county's authority to recover AFDC paid for support of his child before a support order was established. The court explained the legislative decision to treat AFDC and non-AFDC parents differently when determining the starting date of support liability:

> ". . . Before a custodial mother applies for AFDC she may not have any real motive to establish paternity and to receive an order of support . . . . In applying for AFDC, however, she assigns her support rights to the state. [Citations omitted.] Although the state has a motive to seek a declaration of paternity, the practical realities of bringing that action will often mean that the paternity determination is not or cannot be made promptly. The state, however, assumes the obligation to deliver benefits as soon as it find the child eligible to receive them.
>
> "By enacting section 11350 **the Legislature has chosen to commence the noncustodial parent's liability for child support with the grant of benefits rather than with the issuance of a support order.** The practical effect of that decision is not, however, to create unlimited liability in the noncustodial parent. The three-

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6. *Thompson* was cited, quoted, and discussed in the County's opening brief, at oral argument, and in the County's petition for rehearing. It was not mentioned in the Ninth Circuit's opinion, which instead stated, "The County fails to offer any relevant California case or statute that upsets our interpretation of support rights under the 'state statutory and common law,' and accordingly we decline to stray from our resolution of this issue in *Ramirez* [citation]." *In re Visness, supra,* at 57 F.3d 779, App. 35.

year statute of limitations period created by Code of Civil Procedure section 338, subdivision 1, applies to recoupment actions brought under section 11350. [Citations omitted.]

"In seeking recoupment of AFDC benefits from noncustodial parents with the ability to pay, the state is acting to **enforce [the] parental support duty and to recover welfare money it has spent because the noncustodial parent has not met that support duty.**" *City and County of San Francisco, supra*, 172 Cal.App.3d at p. 659, emphasis added.

The *Visness* court also relied upon *In re Marriage of Goosman* 26 Cal.App.4th 838, 31 Cal.Rptr.2d 613 (1994). The *Goosman* case is also correct **as far as it goes**, but it, like *O'Connell*, was a privately litigated family law case. A formal motion for child support was not filed until late in those proceedings, after the financially affluent parents with a shared child custody agreement had previously agreed that neither would pay child support to the other. Wife's date of filing the support motion thus established the beginning of husband's duty to pay support for the children. *In re Marriage of Goosman, supra,* at p. 844. Again, the crucial difference between *Goosman* and *Visness* is that, in *Goosman*, no AFDC was involved and thus the statutory alternate date for establishing support liability[7] did not apply. Therefore, neither *Goosman* nor *O'Connell* discussed the legislature's decision (Welf. & Inst. Code § 11350) to adopt a different date for the absent parent's commencement of child support liability where welfare

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7. I.e., the later of the date aid is granted or three years before filing the complaint for reimbursement. Cal. Welf. & Inst. Code § 11350, App. 72.

has been paid. Thus *Goosman* and *O'Connell* are not authority for the *Ramirez/Visness* holding that an absent parent **never** has any liability for child support, either to child or custodial parent or the county, until a support order is obtained.

The other case upon which *Visness* relied, *Crider v. Superior Court*, 15 Cal.App.4th 227, 18 Cal.Rptr.2d 757 (1993) is a classic example of bad facts making wrong law. In *Crider*, the appellate court sought to avoid a patently counterproductive criminal sentencing disposition, and in so doing, misstated California family support law. Mr. Crider was an employed and nonbankrupt absent parent of Libertarian beliefs, who did not believe the government had any authority to pay money for the support of his children **or** to bill him for reimbursement. Crider did pay ongoing child support of $654 monthly. However, he steadfastly refused to pay the $46 monthly ordered for welfare reimbursement to the County of El Dorado, on grounds of "unconstitutionality." After one year, the county brought an action for **criminal** contempt, which unlike civil contempt could not be purged by payment, even had Crider been willing to back down. For his contempt, Crider received 12 consecutive 5-day county jail sentences (one for each unpaid monthly installment). The sentence, if executed, would have interfered considerably with his ability to pay current support, which was not then in arrears, and his children would probably have again needed AFDC. However, under state law, the sentence was proper. A sympathetic appellate court "solved" the Crider family's problem (and created a larger one) by holding that the delinquent amounts were not "child support," i.e., that they were mere civil debts for which imprisonment is constitutionally forbidden. *Crider*, *supra*, at p. 234. In doing so, the court ignored

the statutory definition of support. *See* Cal. Fam. Code § 150, *supra*, App. 67.

Under California law, the child's right to support from its parents is distinct from a custodial parent's right to reimbursement from the absent parent for amounts expended by custodial parent before issuance of a court order. The child's right is personal, independent, arises at the moment of conception[8] and continues nonstop until emancipation. The California Supreme Court and California Courts of Appeal have repeatedly recognized this principle; the Supreme Court most recently in *In re Marriage of Lippel* 51 Cal.3d 1160, 276 Cal.Rptr 290, 801 P.2d 1041 (1990).

> "'A child has important rights of his own. Thus he can maintain an action against a parent for support, despite the appointment of a guardian and denial of custody to that parent [Citation omitted.] . . . While parents may be bound by a mother's agreement releasing the father from liability for support of the children, neither the court nor the children are bound by the agreement. [Citations omitted.] The single most important consideration in an action for support is the need of the child. [Citation omitted.]'" *In re Marriage of Lippel, supra,* 51 Cal.3d at p. 1172, n. 4, *quoting In re Marriage of O'Connell, supra*, 80 Cal.App.3d at p. 856.

Lippel dealt primarily with the constitutional due process requirement of notice, which as to the claim for child support, had not been provided to father at any time during or after the marital dissolution action, in which he

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8. See Cal. Pen. Code, section 270, App. 66.

took a default. The case therefore did not discuss the scope or effect of the assignment of support rights which was executed by the custodial parent when she later applied for AFDC. However, the above-quoted footnote makes clear -- again -- that the child's right to support was independent of the custodial parent's and could have been independently enforced.[9/] A federal court is "bound to follow an interpretation of state law by the highest state court." *Aydin Corporation v. Loral Corporation* 718 F.2d 897, 904 (9th Cir. 1983). In *Visness*, the Ninth Circuit failed to do so.

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9. See the first sentence of former Civil Code section 248, now Family Code section 4002 (a): "The county may proceed on behalf of a child to enforce the child's right of support against a parent." App. 69. *See also County of Shasta v. Carruthers*, 31 Cal.App.4th 1838, 1841, 38 Cal.Rptr.2d 18 (1995).

III.

THE VISNESS PANEL FAILED TO PROPERLY DISTINGUISH A CHILD'S RIGHT TO SUPPORT FROM AN ENFORCEABLE JUDGMENT THEREFOR

At the core of the *Visness* opinion is the Ninth Circuit's failure to keep separate two discrete concepts. The opinion thus perpetuates the mistake of *Ramirez*, i.e., that there is no difference between a right, or a cause of action, and the money judgment in which it may later be merged.

(1) California statutory and common law is clear that a child's right to support from its parents exists from the moment of the child's creation.

(2) Whether or when the right is enforced, i.e., sued upon and reduced to a money judgment, is and must remain a separate issue.

To repeat, Mr. Visness' AFDC reimbursement debt is, as defined by statute, for support which he owed to his children, which he was found to have had at least partial ability to pay, but did not pay, at the time it was needed. *See* Cal. Welf. & Inst. Code § 11350, App. 72. In the absence of that support, the county, as required by statute, paid a subsistence allowance to his family. In order to receive the welfare allowance, Mrs. Visness assigned to the county both her own and her children's rights to support from Mr. Visness.

Our state assignment statute, Cal. Welf. & Inst. Code section 11477, App. 76, implements the federal government child support program requirement that, as a condition of eligibility to receive AFDC, the applicant must assign to the county any right to support owned either by her or any other person upon whose behalf the application is made, which has accrued at the time of the

assignment. *Compare* 42 U.S.C. § 602(a)(26)(A), App. 63.

When the county finally located and sued Mr. Visness, his accrued assigned support debt was reduced to a judgment payable to the county for AFDC reimbursement. The amount of the debt to the county was, under then existing law, either the amount due under a court support order which was in effect during the period aid was paid, **or if there was no court order then in effect,** an amount determined by the State in accordance with the formula approved by the Secretary [of the Department of Health and Human Services].[10/11/] 42 U.S.C. § 656 (a), App. 63. That debt is not dischargeable in bankruptcy. 42 U.S.C. § 656 (b), App. 64.

The bankruptcy code defines a debt (any debt) as "liability on a claim." 11 U.S.C. § 101 (12). A "claim" includes a "right to payment, **whether or not such right is reduced to a judgment,** liquidated or unliquidated, fixed, contingent, matured, unmatured, disputed,

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10. The formula, as set out in Cal. Welf. & Inst. Code § 11350 was the **lesser** of the amount paid out in aid by the county, or the amount absent parent was reasonably able to pay during the same period. Since 1984, "reasonable ability to pay" in California has been computed according to a rather rigid and complicated mathematical formula which leaves little to judicial or prosecutorial discretion. *E.g., see present* Cal. Fam. Code §§ 4055-4060.

11. Since 1992, the absent parent must pay the amount which would have been ordered under the statewide child support guidelines, even if that amount is much larger than the amount paid in welfare. Any excess over the AFDC reimbursement amount is disbursed to the family. In other words, the court orders three years **retroactive child support**. Cal. Stats. 1991, ch. 110, § 20, *now* Welf. & Inst. Code § 11350. *See also County of Alameda v. Johnson* 28 Cal.App.4th 259, 262-263; 33 Cal.Rptr.2d 483 (1994).

undisputed, legal, equitable, secured, unsecured. . . ." 11 U.S.C. § 101 (5). App. 61.

Under California law, "accrue," as applied to a cause of action, means to arrive, commence, come into existence, or become a presently enforceable demand. *Van Hook v. Southern California Waiter Alliance* 158 Cal.App.2d 556, 323 P.2d 212, 217 (1958). A cause of action accrues at the moment there is a legal right to sue on it. *Weinstock v. Eissler* 224 Cal.App.2d 212, 231, 36 Cal.Rptr. 537, 549 (1964).

> "As used in jurisprudence, the term 'right' connotes the capacity of asserting a legally enforceable claim. . . . [¶] One of the indispensable qualities of a legal right is the certainty that the state will recognize its existence and assist in its enforcement. If the person asserting the claim can predict with certainty that it will be enforced by the courts, he has a legal right -- otherwise, his claim remains an inchoate 'right' without a remedy." *In re Gogabashvele's Estate*, 195 Cal.App.2d 503, 508, 525, 16 Cal.Rptr. 77, 90 (1961).

A child's right to support has, then, already accrued when the custodial parent applies for AFDC; the right accrued, i.e., came into existence, at the same time as the child. *See* Cal. Pen. Code § 270, App. 66. At the time of the assignment, the child has both a right to support and a cause of action to enforce it. *See* Cal. Fam. Code §§ 3900, 4000-4002, 4053 (a). If he did not, he could not obtain the court's assistance in the form of support order -- which the Ninth Circuit has said he must have obtained before he has a right at all.

Whether custodial parent has at the time of assignment an installment or lump sum **judgment** for a

fixed amount of money, or whether custodial parent could then personally seek reimbursement from absent parent for previously paid expenses (under California law, she could not), are separate issues. The *Ramirez* and *Visness* panels pureed the three concepts, and produced a product which encourages welfare fraud and misuse of the bankruptcy remedy, and puts counties at risk of severe financial harm.[12/]

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12. We respectfully refer the court to the *amicus curiae* brief(s) to be filed in support of this petition by the City and County of San Francisco, the County of Tulare, and perhaps other California counties.

IV.

A JUDGMENT FOR REIMBURSEMENT OF PUBLIC ASSISTANCE IS A DEBT "IN THE NATURE OF SUPPORT" UNDER THE BANKRUPTCY CODE AND IS THEREFORE NONDISCHARGEABLE

Whether a child has a right to support is a matter of state law. However, the definition of support, for purposes of dischargeability in bankruptcy, is strictly a matter of federal law. *See In re Harrell*, 954 F.2d 902, 905 (11th Cir. 1985); *In re Williams*, 703 F.2d 1055, 1056-7 (8th Cir. 1983); *Erspan v. Badgett*, 647 F.2d 550, 555 (5th Cir. 1981) quoting *In re Nunnally*, 506 F.2d 1024, 1027 (5th Cir. 1975); *In re Huber*, 80 B.R. 531, 532 (Bankr. D. Colo. 1987).

Under the Bankruptcy Code, obligations **in the nature of support** are not dischargeable. 11 U.S.C. § 523 (a)(5)(B). To determine whether a debt is in the nature of support, bankruptcy courts must look to federal law to determine the nature of the obligation. *Shaver v. Shaver*, 736 F.2d 1314, 1316 (9th Cir. 1984); *see also Stout v. Prussel*, 691 F.2d 859, 861 (9th Cir. 1982). In *Shaver*, the court found a debt to be "in the nature of" alimony -- and nondischargeable -- even though alimony was not permitted under the facts of *Shaver*, under the law of the state where the agreement was made (Indiana). *Shaver, supra,* at p. 1316. See also *Matter of Biggs*, 907 F.2d 503 (5th Cir. 1990). Similarly, a debtor's agreement to pay educational expenses which were not enforceable as support under state law was held under federal law to be "in the nature of support." *Boyle v. Donovan* 724 F.2d 681, 683 (8th Cir. 1984).

When a governmental entity furnishes necessities or support for a minor and then sues the parent for reimbursement, see Cal. Fam. Code §§ 4000-

4002, the debt which results from the judgment has consistently been deemed to be "in the nature of support." The characterization is premised on the fundamental common law and statutory obligation of parents to support their children. *See e.g., In re Burton*, 132 B.R. 575, 584 (Bankr. S.D. Ind. 1991); *In re Canganelli*, 132 B.R. 369, 394 (Bankr. N.D. Ind. 1991); *In re Jones*, 94 B.R. 99, 102 (Bankr. N.D. Oh. 1988); *In re Huber, supra*; *In re Mojica*, 30 B.R. 925, 930 (Bankr. E.D.N.Y. 1983); *In re McLean*, 59 B.R. 6175 (Bankr. E.D.Va. 1986).

Petitioner is aware of the general rule that exceptions to dischargeability are strictly construed in favor of the debtor. However, this rule has not been generally applied to debts "in the nature of support." The general rule that exceptions to discharge should be narrowly construed in favor of the debtor "is overcome . . . by the Congressional policy which favors enforcement of obligations for spousal and child support." *In re Booch*, 95 B.R. 852, 854-855 (Bankr. N.D.Ga. 1988); *see also Shine v. Shine*, 802 F.2d 583, 585-586 (1st Cir. 1988).

The liberal construction to be given the support exception to discharge is comfortably established in judicial tradition:

> "Unless positively required by direct enactment[,] the courts should not presume a design upon the part of Congress[,] in relieving the unfortunate debtor[,] to make the law a means of avoiding enforcement of the obligation, moral and legal, devolved upon the husband to support his wife and to maintain and educate his children." *Wetmore v. Markoe*, 196 U.S. 68, 77; 25 S.Ct. 172, 175; 49 L.Ed. 390 (1904).

Courts have interpreted the specific language of the 11 U.S.C. § 523 (a) exception relating to the sources of the nondischargeable debt as an attempt to accomplish the goal of making support obligations nondischargeable.

> "There is, however no apparent logic for not excepting any legitimate debt for alimony or support simply because it arose in a manner not expressly enumerated in the statute. In bankruptcy proceedings equity requires that the substance of a debt should prevail over the form where appropriate. *Pepper v. Litton* 308 U.S. 295, 305-306; 60 S.Ct. 238, 244; 84 L.Ed. 281 (1939)." *In re Mojica, supra,* 30 B.R. at pp. 928-930.

In sum, AFDC payments and reimbursement judgments therefor are unquestionably payments and debts "in the nature of support." They are premised on an absent parent, a child in need of support, and the right of the child -- which arises at conception -- to receive that support from the absent parent. They are "support" under state law and -- at least -- "in the nature of support" under federal law. Discharge in bankruptcy is impermissible. The judgment of the Ninth Circuit Court of Appeals must be reversed.

CONCLUSION

We respectfully urge this court to grant our petition for writ of certiorari.

Dated: October 19, 1995.

Respectfully submitted,

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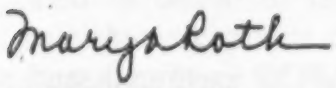

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SF93AP0577

APPENDICES

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Re Dale H. Visness,	
Debtor.	No. 93-17197
	D.C. No. CV-93-02222-VRW
Dale H. Visness,	
Plaintiff-Appellee,	**OPINION**
v.	
CONTRA COSTA COUNTY; CONTRA COSTA COUNTY DISTRICT ATTORNEY,	
Defendants-Appellants.	

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Argued and Submitted
April 14, 1995—San Francisco, California

Filed June 12, 1995

Before: Thomas Tang, Mary M. Schroeder,
and Stephen S. Trott, Circuit Judges.

Opinion by Judge Trott

Mary A. Roth, Deputy Atty. Gen., San Francisco, CA, for defendants-appellants.

Shian MacLean, Dublin, CA, for plaintiff-appellee.

John S. Higgins, Jr., Deputy Dist. Atty., Visalia, CA, for amicus.

Appeal from the United States District Court for the Northern District of California.

Before: TANG, SCHROEDER, and TROTT, Circuit Judges.

TROTT, Circuit Judge:

OVERVIEW

Chapter 7 debtor Dale Visness initiated this adversary action during his bankruptcy proceeding to determine the dischargeability of his debt to Contra Costa County ("County") for Aid for Families with Dependent Children ("AFDC") disbursements made to his spouse for the support of their three minor children. The County appeals the district court judgment affirming the bankruptcy court's determination that Mr. Visness's debt was dischargeable under 11 U.S.C. § 523(a)(5) and this court's decision in *In re Ramirez*, 795 F.2d 1494 (9th Cir. 1986), *cert. denied*, 481 U.S. 1003, 107 S.Ct. 1624, 95 L.Ed.2d 198 (1987). The County contends the *Ramirez* opinion is no longer binding precedent because California case law and congressional amendments to 11 U.S.C. § 523(a)(5) undermine that decision. We disagree, and for

the reasons set forth below, we confirm the continuing viability of *Ramirez*.

BACKGROUND

1. *The Statutory Scheme*

Ordinarily a debtor who successfully navigates the bankruptcy process is entitled to a discharge of all pre-petition debt. However, there are certain types of debt that Congress has declared to be nondischargeable. For example, a debt owed "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child" is not dischargeable under 11 U.S.C. § 523(a)(5). However, if such a debt is assigned to another entity, the debt *is* dischargeable, *unless* the debt is assigned pursuant to 42 U.S.C. § 602(a)(26).[1/]

Section 602(a)(26) requires a state that is participating in the AFDC program to condition eligibility for AFDC aid on an applicant's assignment to the state of any support rights which have *accrued* at the time such assignment is executed.[2/] Another federal statute,

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1. A July 10, 1984 amendment also makes assignments to "the Federal Government or to a State or any political subdivision of such State" nondischargeable. Pub.L. 98-353 § 454(b), 98 Stat. 375.

2. Section 602(a)(26) states in relevant part that, as a condition of eligibility for aid, each applicant or recipient will be required—

> (A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed.

42 U.S.C. § 656(a), specifies that the assigned support rights will "constitute an obligation owed to such State by the individual responsible for providing such support." The statute then provides that the amount of the obligation shall be 1) "the amount specified in a court order," or 2) "if there is no court order, an amount determined by the State in accordance with a formula approved by the Secretary." Additionally, § 656(b) states that "[a] debt which is a child support obligation assigned to a State under section 602(a)(26) . . . is not released by a discharge in bankruptcy."

California implemented the directives contained in § 602(a)(26) by passing Cal. Welf. & Inst. Code § 11477(a), which requires an AFDC applicant to assign to the state all *accrued* support rights. Separately, Cal. Welf. & Inst. Code § 11350 allows a county to sue a noncustodial parent for the amount of AFDC aid paid to the family during a period of separation or desertion.

2. *Facts and Prior Proceedings*

During the periods September 1, 1984 to October 31, 1984 and March 1, 1985 to September 30, 1987, Mrs. Bernadette Visness received AFDC public assistance on behalf of her three minor children. As mandated by 42 U.S.C. § 602(a)(26) and Cal. Welf. & Inst. Code 11477(a), before receiving the AFDC assistance Mrs. Visness was required to assign to the County any accrued rights to support which either she or her children possessed. At the time Mrs. Visness executed the assignment, she had not obtained a judicial decree obligating Mr. Visness to compensate her for the expenses of their children; Mr. and Mrs. Visness had not secured a divorce decree nor had they entered into a settlement agreement.

Pursuant to Cal. Welf. & Inst. Code § 11350, the County subsequently filed suit against Mr. Visness in superior court seeking to establish paternity, to set up future child support payments, and to obtain reimbursement for AFDC payments previously paid to Mrs. Visness. On November 5, 1987, Mr. Visness stipulated to paternity, to child support payments of $332.00 per month, and to reimbursement to the County for past AFDC payments in the amount of $9,463.00

On July 9, 1992, Mr. Visness filed a voluntary petition for bankruptcy under Chapter 7, and listed the County as creditor. Subsequently, Mr. Visness filed a complaint in the bankruptcy action to determine the dischargeability of the reimbursement judgment under 11 U.S.C. § 523(a)(5). The bankruptcy court concluded that this court's decision in *Ramirez* compelled a determination that Mr. Visness's debt was dischargeable.

The County appealed to the district court, contending the *Ramirez* decision had been undermined by subsequent congressional amendments to § 523(a)(5). The County also argued that the court in *Ramirez* failed to consider a child's independent right to parental support. The district court rejected both arguments, and approved of the bankruptcy court's reliance on *Ramirez*.

DISCUSSION

1. *The Ramirez Decision*

The fact giving rise to the *Ramirez* controversy are virtually identical to those of the present case. Mr. and Mrs. Ramirez separated but did not obtain a dissolution decree or court order for alimony or child support. *Ramirez*, 795 F.2d at 1495. Thereafter, Mrs. Ramirez applied for and received AFDC assistance. She assigned to the County any accrued support rights possessed by

herself or her children. *Id.* Subsequently, the County filed an action against Mr. Ramirez pursuant to Cal. Welf. & Inst. Code § 11350, seeking reimbursement of AFDC payments made to Mrs. Ramirez on behalf of the minor children. A default judgment was entered against Mr. Ramirez for past AFDC payments in the sum of $14,750. *Id.*

Mr. Ramirez filed a petition for Chapter 7 bankruptcy and was eventually granted a discharge of all dischargeable debts. *Id.* at 1496. Shortly thereafter, Mr. Ramirez filed a complaint in bankruptcy court to determine the dischargeability of the reimbursement judgment. The bankruptcy court determined the debt was dischargeable and the district court affirmed. *Id.* On appeal, this court examined the applicable statues and concluded that the debt owed to the County by Mr. Ramirez did not fit within the exception to dischargeability set out in 11 U.S.C. § 523(a)(5).

At the time the *Ramirez* court rendered its decision § 523(a)(5) did not permit a debtor to discharge in bankruptcy any debt

> to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such a spouse or child, *in connection with a separation agreement, divorce decree, or property settlement agreement,* but not to the extent that—
>
> (A) such a debt is assigned to another entity, voluntarily, by operation of law, or otherwise (*other than debts assigned pursuant to section 402(a)(26) of the Social Security Act [42 U.S.C. § 602(a)(26)]*);
>
> . . . . .

795 F.2d at 1496 (quoting 11 U.S.C. § 523(a)(5)). From this convoluted provision, we identified at least three

salient factors that must be present before an assigned debt will be deemed nondischargeable. First, the debt in question must be an obligation owed to a spouse, former spouse, or child of the debtor. *See id.* at 1497-98. Second, such a debt must have arisen in connection with a separation agreement, divorce decree, or property settlement. *Id.* at 1496. Third, if a debt meeting these two requirements is assigned, in order for it to retain its nondischargeable characteristic it must be assigned pursuant to 42 U.S.C. § 602(a)(26). *Id.* at 1496-98.

Our concern in *Ramirez* focused on whether Mr. Ramirez's debt, established by the County pursuant to Cal. Welf. & Inst. Code § 11350, had been assigned to the County under § 602(a)(26). *Id.* at 1497-98. We observed that both § 602(a)(26) and the implementing state statue, Cal. Welf. & Inst. Code § 11477(a), provided for the assignment by the AFDC applicant of any rights to support "which *have accrued* at the time the assignment is executed." *Id.* at 1497. In seeking to determine when, if ever, a support right accrued in favor of Mrs. Ramirez and the children, we looked to the state's "statutory and common law." *Id.* Our examination of relevant California law led us to conclude that a support right does not accrue in favor of a custodial parent or a child until there exists a court order establishing the noncustodial parent's support duty. *Id.* at 1497, 1498 n. 3.

Given the fact that Mr. Ramirez's support obligation had not been set by court decree at the time Mrs. Ramirez assigned to the County the support rights of her children, we concluded "that Mr. Ramirez's debt to the County did not arise from Mrs. Ramirez's assignment of accrued rights because . . . Mrs. Ramirez had no accrued rights." *Id.* at 1497. Accordingly, we held that "[b]ecause Mr. Ramirez's debt to the County arose from the operation of [Cal. Welf. & Inst. Code §

11350] and not from any right assigned by Mrs. Ramirez, the debt falls outside the scope of § 602(a)(26) and is therefore not subject to . . . nondischargeability." *Id.* at 1498.

Judge Ferguson dissented, disagreeing with the majority's interpretation of California law. Judge Ferguson opined that the minor children's right to Mr. Ramirez's parental support had accrued at the time Mrs. Ramirez assigned the support rights to the County. *Id.* at 1500-01 (Ferguson, J., dissenting).

2. *The County's Contentions*

The facts underlying our decision in *Ramirez* are "on all fours" with the events giving rise to the controversy before us. This panel is "bound by decisions of prior panels unless an en banc decision, Supreme Court decision, or subsequent legislation undermines those decision." (*United States* v. *Washington* 872 F.2d 874, 880 (9th Cir. 1989) (internal quotations omitted). Nevertheless, to the extent the *Ramirez* decision rests on state law, a change in California statutory and common law also would permit this panel to reconsider the issues decided by the *Ramirez* court.

The County advances two arguments that potentially avoid the force of stare decisis: (1) the California court case defining a child's independent right to parental support undermine the foundation upon which *Ramirez* rests; and (2) the congressional amendments to 11 U.S.C. § 523(a)(5) in 1984 and 1986 alter the legal framework underpinning the *Ramirez* decision. We reject both contentions.

a. *A Child's Support Right*

[1] The County argues that under California law a child possesses a right to parental support that is independent and different from the custodial parent's derivative right to child support. Furthermore, the County contends that by its very nature a child's right to support accrues from birth onward. According to this theory, the assigned support rights of the child are quantified in accordance with 42 U.S.C. § 656(a), when a reimbursement judgment is rendered under Cal. Welf. & Inst. Code § 11350. Thus, an action pursuant to section 11350 is merely a means by which the County determines the value of the support right assigned to it.

We considered and rejected this very argument in *Ramirez*. In fact, this issue was the source of disagreement between Judge Ferguson and the majority. After considering relevant California statutes and case law, Judge Ferguson concluded that Mrs. Ramirez had assigned to the County the accrued support rights of her children. 795 F.2d at 1500-01 (Ferguson, J., dissenting).

The majority, however, disagreed with this interpretation of California law. While acknowledging that a parent is obligated to support his or her child, the majority concluded that such a right does not accrue to a child in the custody of a parent, and is therefore not assignable, until a court decree or agreement establishes the noncustodial parent's support duty. *Id.* at 1497, 1498 n. 3 (citing *In re Marriage of O'Connell*, 80 Cal.App.3d 849, 855, 146 Cal.Rptr. 26 (1978); *Amie* v. *Superior Court*, 99 Cal.App.3d 421, 425-26, 160 Cal.Rptr. 271 (1979)).

Both the County and *amicus* contend the California Supreme Court's discussion of a child's legal right to support in *In re Marriage of Lippel*, 51 Cal.3d 1160, 276 Cal.Rptr. 290, 801 P.2d 1041 (1990), bolsters the County's argument. The language the County and

amicus point to, however, consists solely of a quotation from *O'Connell*, *see Lippel*, 276 Cal.Rptr. at 296 n. 4, 801 P.2d at 1047 n. 4, the very case the *Ramirez* majority relied upon, *see* 795 F.2d at 1497, 1498 n. 3. Moreover, the *Lippel* court's decision is not contrary to *Ramirez*, and the *Lippel* court's discussion of *O'Connell* does not undermine the *Ramirez* court's reasoning.

In fact, a pair of recent California Court of Appeal decisions confirm the construction of California law relied upon by the *Ramirez* majority. The court in *Crider v. Superior Court*, 15 Cal.App.4th 227, 18 Cal.Rptr.2d 757 (1993), refused to characterize a judgment obtained pursuant to Cal. Welf. & Inst. Code § 11350 as an adjudication of a support obligation owed by the noncustodial parent to the custodial parent or child. *Id.* at 231-34, 18 Cal.Rptr.2d 757. The court observed that under California law, without a preexisting court decree establishing the non-custodial parent's support duty, there is no outstanding right to reimbursement for child support. *Id.* at 232 n. 5, 18 Cal.Rptr.2d 757 (citing *Amie*, 99 Cal.App.3d at 425, 160 Cal.Rptr. 271). Accordingly, the court determined that a judgment against a parent for reimbursement of AFDC benefits under section 11350 "enforces a duty to repay a statutorily created debt, not a duty owed to the spouse or child." *Id.* at 234, 18 Cal.Rptr.2d 757.

Similarly, the court in *In re Marriage of Goosmann*, 26 Cal.App.4th 838, 31 Cal.Rptr.2d 613 (1994), vacated a trial court's order directing a noncustodial parent to make retroactive child support payments. According to the court, "[i]t has long been the rule in California that an order for child support only operates prospectively." *Id* at 844, 31 Cal.Rptr.2d 613. The court explained the "long-standing rule is that a parent cannot claim reimbursement for money paid out in support of a child

prior to an order of the court directing the other parent to pay support." *Id.*

The County fails to offer any relevant California case or statute that upsets our interpretation of support rights under the "state statutory and common law," and accordingly we decline to stray from our resolution of this issue in *Ramirez*. *See* 795 F.2d at 1497, 1498 n. 3.

b. *1984 and 1986 Amendments to 11 U.S.C. § 523(a)(5)*

[2] The *Ramirez* court did not discuss the 1984 amendment to § 523(a)(5); presumably the 1982 version of the statute applied to Mr. Ramirez's action in the bankruptcy court. After, the *Ramirez* decision was filed, Congress again amended § 523(a)(5) in 1986. At the time Mr. Visness brought his adversary action to determine the dischargeability of the County's debt, the statute did not allow an individual debtor to discharge any debt

> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or **other order of a court of record**, *determination made in accordance with State or territorial law by a governmental unit*, or property settlement agreement, but not to the extent that—
>
> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section [602](a)(26) of the Social Security Act, **or any such debt which has been assigned to the**

Federal Government or to a State or any political subdivision of such State)

11 U.S.C. § 523(a)(5). The highlighted text was part of an amendment enacted July 10, 1984, by Pub.L. 98-353 § 454(b)(2), 98 Stat. 375; the italicized text was added October 27, 1986, by Pub.L. 99-554 § 281, 100 Stat. 3116.

The portion of the 1984 amendment concerning assignments, further limits the dischargeability of support obligations by excluding any such debt that is assigned to a governmental entity. This amendment, however, does not affect the present case. Here, the assignment by Mrs. Visness to the County was executed in accordance with the authorization provided by § 602(a)(26) and by the operation of Cal. Welf. & Inst. Code § 11477(a), the same statutory scheme that governed Mrs. Ramirez's assignment. Therefore, in this regard our analysis in *Ramirez* continues to apply.

The County contends the 1984 and 1986 additions to § 523(a)(5) that extend the reach of that provision to support obligations created in connection with an "order of a court of record, determination made in accordance with State . . . law" undermine *Ramirez's* holding. Specifically, the County contends the *Ramirez* court's requirement that a non-dischargeable debt be incurred in connection with a separation agreement or divorce decree is no longer applicable. *See* 795 F.2d at 1496. According to the County, now that Congress has broadened the scope of nondischargeable support obligations to include those arising from any "order of a court of record," a reimbursement judgment under Cal. Welf. & Inst. Code § 11350 also falls within § 523(a)(5). *See In re Morris*, 139 B.R. 17, 18 (Bankr. C.D. Cal. 1991) (concluding that *Ramirez* is eviscerated by the amendments to § 523(a)(5)). *But see In re Browning*, 161

B.R. 841, 842-46 (Bankr. E.D. Cal. 1993) (reaching the opposite conclusion).

Congress apparently enacted the 1984 and 1986 amendments in recognition of the numerous procedures, both judicial and administrative, employed by the states when determining parental support obligations.[3/] We will assume, without deciding, that a judgment rendered in accordance with section 11350 could be an "order of a court" within the meaning of § 532(a)(5). However, as we discussed in *Ramirez*, before an assigned debt is entitled to nondischargeable status, it must meet *all* the § 532(a)(5) requirements. Specifically, an obligation adjudicated pursuant to section 11350 must represent an assignment to the County of rights that have *accrued* to a "spouse, former spouse, or child of the debtor." *See* 11 U.S.C. § 532(a)(5); *Ramirez*, 795 F.2d at 1496-98.

At the time Mrs. Visness executed the assignment, neither Mrs. Visness nor the children had taken the steps necessary under California law to establish their right to Mr. Visness's parental support: they had not initiated a court action seeking to establish Mr. Visness's support duty nor had they persuaded Mr. Visness to enter into a settlement agreement acknowledging his support obligation. No right to support had therefore accrued in favor of Mrs. Visness or the children, and thus Mrs. Visness could not, and did not, assign to the County a debt owed to her or her children by Mr. Visness. *See*

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3. Legislative history to the 1986 amendment states in relevant part:

> This provision will expand the exception to discharge in 11 U.S.C. § 523(a)(5) to embrace support determinations involving various types of processes or procedures (e.g. administrative expedited judicial) and various forms of determinations (e.g. rules, orders).

H.R. Conf. Rep. No. 958, 99th Cong. 2d Sess. 47-48 (1986), *reprinted in*, 1986 U.S.C.C.A.N. 5227, 5248-49.

Ramirez, 795 F.2d at 1497, 1498 n. 3 (concluding that under California law neither the custodial parent nor the minor child has a right to support payments absent a court decree or agreement).

[3] Correspondingly, Mr. Visness's obligation to the County did not derive from a debt to a spouse, former spouse, or child of the debtor. *See* 11 U.S.C. § 523(a)(5). Instead, Mr. Visness's debt to the County arose from the operation of Cal. Welf. & Inst. Code § 11350. *See Ramirez*, 795 F.2d at 1498; *see also Crider*, 15 Cal.App.4th at 231-32, 234, 18 Cal.Rptr.2d 757 ("[T]he funds reimbursed under section 11350 are not used to support the noncustodial parent's children, but rather to alleviate the burden on taxpayers. . . . [T]he section 11350 reimbursement order here enforces a duty to repay a statutorily created debt, not a duty owed to the spouse or child.") Such a debt is dischargeable. *Ramirez*, 795 F.2d at 1499.

[4] In sum, *Ramirez* still applies when the question is the dischargeability of a support obligation assigned pursuant to 42 U.S.C. § 602(a)(26), and our resolution of the controversy in *Ramirez* controls the outcome of this case: Mr. Visness's debt to the County is dischargeable.

CONCLUSION

[5] Mr. Visness asks us to award attorney's fees, if appropriate, pursuant to 28 U.S.C. § 2412(d)(1)(B) or Cal.Civ. Proc. Code § 1021.5. Neither statute is applicable, and we therefore deny Mr. Visness's request.

The judgment of the district court is AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Re DALE H. VISNESS, Debtor.	
DALE H. VISNESS, Plaintiff-Appellee, v. CONTRA COSTA COUNTY; CONTRA COSTA COUNTY DISTRICT ATTORNEY, Defendants-Appellants.	No. 93-17197 D.C. No. CV-93-02222-VRW ORDER
APPELLATE COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION,	

Before: TANG, SCHROEDER, and TROTT, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DALE H. VISNESS, Plaintiff, v. CONTRA COSTA COUNTY DISTRICT ATTORNEY, Defendant.	)	No. C-93-2222-VRW **MEMORANDUM AND OPINION**

This case arises out of the filing of a Chapter 7 bankruptcy petition by the appellee-debtor Dale H. Visness. At issue is the dischargeability, in bankruptcy proceedings, of a debt Mr. Visness owes to the appellant Contra Costa County ("County") pursuant to Cal Welf & Inst Code § 11350 (West 1991 & Supp 1993). This statute entitles the County to obtain from the non-custodial parent either partial or total reimbursement for "AFDC" (Aid to Families with Dependent Children) disbursements paid to the custodial parent.

For the periods of September 1, 1984, to October 31, 1984, and March 1, 1985, to September 30, 1985, Mrs. Bernadette Dione Visness applied for and received AFDC public assistance on behalf of her three minor children. In accordance with federal and state statutes, receipt of this aid was conditioned on Mrs. Visness assigning to the County all accrued rights to support which either she or her children possessed. At the time Mrs. Visness executed such an assignment, the Visnesses had not arrives at a property settlement agreement or a separation agreement, nor had they obtained a divorce decree. Additionally, there was no court order requiring Mr. Visness to compensate Mrs. Visness for the expenses of their children.

On September 16, 1987, appellant County filed suit against Mr. Visness in superior court seeking to establish paternity, to obtain reimbursement for AFDC payments previously paid to Mrs. Visness, and to set up future child support payments. On November 5, 1987, Mr. Visness stipulated to paternity, to reimbursement to the County for past AFDC payments in the amount of $9,463.00, and to child support payments of $332.00 per month.

On July 9, 1992, Mr. Visness filed a voluntary petition in bankruptcy under Chapter 7, listing the County as a creditor. This bankruptcy petition is still pending. On October 8, 1992, Mr. Visness filed a complaint in the bankruptcy action to determine the dischargeability of the reimbursement judgment. Because there was no factual dispute, the parties agreed to proceed by summary judgment. Thus, on December 30, 1992, the appellant County filed its motion seeking a determination that the reimbursement judgment was non-dischargeable as a matter of law.

The bankruptcy court issued a written "decision" on February 23, 1993, concluding that the debt was

dischargeable and thus denying the County's summary judgment motion. In this "decision," the bankruptcy judge asked Mr. Visness to submit a proposed order within ten days. On March 9, 1993, the County learned that Mr. Visness had not yet submitted a proposed order, and on March 15, 1993, the County reminded him to do so. Also on or about this date, the County submitted to the bankruptcy court a notice of appeal, resulting in a referral of the case to the Ninth Circuit Bankruptcy Appellate Panel (BAP). In the meantime, Mr. Visness finally submitted a proposed order to the bankruptcy court on March 16, 1993, but the County objected to the language thereof, claiming it did not accord with the court's February 23 decision.

On March 26, 1993, the BAP issued a notice of deficient appeal, apparently under the erroneous impression that a "final order" had been entered on February 23, 1993, and that the County had not filed its appeal within the ten day time period allowed by Fed R Bankr P 8002 and 9021. On April 1, 1993, the County exercised its right to file with the BAP an objection to appellate review by that court, requesting an appeal in the district court instead. Accordingly, on April 2, 1993, the BAP transferred the case to the district court. Oddly, on April 6, 1993, after the transfer to the district court had already occurred, the County responded to the "deficient appeal" notice by submitting papers to the BAP. In these papers, the County argued that because no order had yet been issued, the time period for filing an appeal had not even commenced. Finally, on September 9, 1993, an order denying the County's summary judgment motion was finally entered in the bankruptcy court.

Upon consideration of all papers submitted and oral arguments made, and upon review of the record, the

bankruptcy court's denial of the County's motion for summary judgment is **AFFIRMED.**

I

This appeal comes to this court pursuant to 28 USC § 158(a) (1993), which permits the district courts to hear appeals from "final judgments, orders, and decrees" of bankruptcy judges in cases which have been referred to the bankruptcy courts. Although all such appeals are initially transferred to the Ninth Circuit Bankruptcy Appellate Panel, see May 1985 Judicial Council Amended Order Establishing and Continuing the Bankruptcy Appellate Panel, ¶ 3(a), any party can request review in the district court instead. Id at ¶ 3(b). In the instant case, appellant County timely filed its appeal and timely requested review in the district court.

As a preliminary matter, it is important to note that the County is appealing from the denial of its motion for summary judgment. Ordinarily, such denials are interlocutory in nature and are not appealable. See William Schwarzer, A. Wallace Tashima, and James Wagstaffe, California Practice Guide ¶ 14:357 (The Rutter Group 1989). However, where the denial of a summary judgment motion completely disposes of an adversary proceeding, courts have embraced a more lenient definition of "final order." See, e.g., In re Stanton, 766 F2d 1283, 1285 (9th Cir 1985); In re Gaines, 932 F2d 729, 731-732 (8th Cir 1991). In the case before the court, the parties agreed to proceed by summary judgment motion because they conceded that there were no disputed issues fact. Because the bankruptcy court's ruling on the issue on appeal before this court completely resolved the adversary proceeding between appellant and appellee, the court concludes that the denial of appellant's summary judgment motion

constituted a "final order" within the meaning of 28 USC § 158(a).

Given that the only issue on appeal here is a question of law, the bankruptcy court's ruling is reviewable de novo. In re Ramirez, 795 F2d 1494, 1496 (9th Cir 1986). See also *In re Bishop*, 819 F2d 214, 215 (9th Cir 1987); In re Manoa Finance Co., 781 F2d 1370, 1374 (9th Cir 1986).

A

The issue presented by the instant appeal implicates three federal statutes and two California state laws. Therefore, as a preliminary matter, it is necessary to understand how these various statutes fit together. This dispute predominantly centers around the rules surrounding bankruptcy under Title 11, on the one hand, and the AFDC welfare scheme on the other. These statutes are discussed in turn.

The purpose of the bankruptcy laws, of course, is to give a debtor a "new start" by discharging his debts. However, various policy reasons support making certain types of debts nondischargeable. See generally 11 USC § 523 (1993). This statute, in relevant part, makes nondischargeable any debt:

> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that -

> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to [the AFDC statutory scheme] section 402(a)(26) [42 USC § 602(a)(26)] of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); * * *

11 USC § 523(a)(5) (emphasis added). There are several important points to note about this nondischargeability provision. First, only those debts which are "to a spouse, former spouse, or child of the debtor" are nondischargeable. Second, the debt to one of these persons must arise "in connection with" one of four sources: (1) a separation agreement; (2) a divorce decree; (3) an "other order" of a court of record; or (4) a property settlement agreement. Third, if one of these persons to whom the debt is owed assigns the right, voluntarily or as a matter of law, the debt <u>is</u> dischargeable. The exception to this arises if the assignment is made pursuant to the AFDC statutory scheme. Therefore, in order for an <u>assigned</u> debt to be nondischargeable under § 523(a)(5), it must: (1) be a debt owed to a spouse or child; (2) arise from one of the four "in connection with" sources; and (3) be assigned pursuant to the AFDC statute.

The AFDC statute, codified at 42 USC § 601 et seq (1991), provides federal funding to states which wish to provide welfare assistance to families with children. In order to participate, states must satisfy numerous criteria. See Id at § 602. One of these requirements, and the one

relevant to the instant case, states that a participating state must:

> provide that, as a condition of eligibility for aid, each applicant or recipient will be required * * * to assign the State any rights to support from any other person such person may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed.

42 USC § 602(a)(26)(A) (emphasis added). California, as a participating state, has passed legislation requiring such an assignment of accrued rights. Cal Welf & Inst Code § 11477(a) (West 1991 & Supp 1993).[1/] Another federal statute, 42 USC § 656 (1991), specifies the nature of the right assigned pursuant to the above statute:

> (a)(1) The support rights assigned to the State under section 602(a)(26) of this title * * * shall constitute an obligation owed to such State by the individual responsible for providing such support.* * *
>
> (2) The amount of such obligation shall be -
> (A) the amount specified in a court order which covers the assigned support rights, or

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1. The second California statute implicated here, Cal Welf & Inst Code § 11350, is not one mandated by federal law. Instead, this state statute allows the county to recover from the noncustodial parent any AFDC disbursements paid to the custodial parent. See infra p 1.

(B) if there is no court order, an amount determined by the State in accordance with a formula approved by the Secretary

* * *

(b) A debt which is a child support obligation assigned to a State under section 602(a)(26) of this title is not released by a discharge in bankruptcy under Title 11.

42 USC § 656 (emphasis added). Examining the combined effect of the above two AFDC statutes, i.e., § 602(a)(26) and § 656, it appears that when the mother[2/] applies for AFDC aid, she assigns to the state all accrued support rights which she or her children then possess. Furthermore, the father who owes the accrued support obligations owes an amount set by either a court order covering the support rights or if there is no court order, an amount determined by a formula provided by the state. Therefore, these statutes clearly imply that the phrase "accrued rights" does not necessarily refer only to those rights which are embodied in a court order; instead, one can seemingly have accrued rights even in the absence of such an order.

Combining all three federal statutes (11 USC 523(a)(5), 42 USC § 602 (a)(26), and 42 USC § 656), the following conclusion can be reached. In order to find an AFDC-assigned marital or child support debt nondischargeable in a bankruptcy proceeding, the court must find that: (1) a debt was owed to a spouse or child; (2) the debt arose "in connection with" a

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2. Because of the genders of the parties in the instant case, the court herein refers to the custodial parent with feminine pronouns and the noncustodial parent with masculine ones.

separation agreement, divorce decree, other order of court, or property settlement agreement; and (3) the support debt owed is an "accrued" right at the time of assignment. And as mentioned above, a debt may be considered "accrued" even if no court order establishing the debt exists.

B

The above formulation of the legal requirements for finding a debt nondischargeable brings into sharp focus the pertinent inquiry: when does a debt to a spouse or child arise, and more particularly, when is it considered "accrued?" The Ninth Circuit, in In re Ramirez, 795 F2d 1494 (9th Cir 1986), addressed precisely these points.[3/]

The facts of Ramirez virtually mirror those of the instant case. Jose and Yolanda Ramirez, who had parented two children, separated in 1977 without a dissolution decree or court order for alimony or child support. In 1979, Mrs. Ramirez, who had custody of the children, requested and received AFDC aid from the County of Santa Clara. In accordance with Cal Welf & Inst Code § 11477, such aid was conditioned on Mrs. Ramirez assigning to the county any accrued rights to support from Mr. Ramirez which either she or her children held. The County of Santa Clara later obtained judgment against Mr. Ramirez for reimbursement of the AFDC payment amounts it had distributed to Mrs. Ramirez. When Mr. Ramirez filed for Chapter 7

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3. The analysis of the Ramirez court did not directly follow the approach outlined above, which this court believes to be the correct one. Nonetheless, the Ramirez court issued a clear ruling on the dispositive issues, constraining this court to affirm the bankruptcy court's ruling even under the analysis contained herein.

bankruptcy, he brought suit against the county, seeking a determination of the dischargeability of the debt.

The central and most significant holding of the Ramirez court has to do with the determination of the point at which rights are to be considered "accrued." As noted above, two of the federal statutes § 602(a)(26) and § 656, imply that "accrued rights" can exist despite the absence of a court order. The state law of California, however, suggests that "absent a dissolution decree ordering support payments, the parent with custody bears full responsibility for the support of the child." Ramirez, 795 F2d at 1497 (quoting In re Marriage of O'Connell, 80 Cal App 3d 849, 855 (1978)). Additionally, "a mother cannot claim reimbursement for money paid out in support of a child prior to an order of the court directing the father to pay support to meet the current needs of the child." Ramirez, 795 F2d at 1497 (quoting Bierl v McMahon, 270 Cal App 97, 105 (1969)). Finally, a California statute provides that absent an agreement, a parent is not bound to compensate any other person (presumably including the custodial parent) for sums expended by that person for the voluntary support of the parent's child. Cal Civ Code § 208 (West 1982 & Supp 1993).

Faced with the apparently conflicting sentiments of the federal and state laws, the Ramirez court chose to follow state law, stating that "[t]he determination of child support rights is a matter of state statutory and common law." Ramirez, 795 F2d at 1497. Therefore, the court concluded that because there is no reimbursement obligation in the absence of a court order, rights are not to be considered "accrued" until there exists a court order establishing the support duty. Id. Because no divorce decree or other court order had been issued, when Mrs. Ramirez applied for AFDC she had no support rights to assign to the county. Id. Instead, the

court held, the county's right to reimbursement from Mr. Ramirez derived from a separate and "independent" state statute, Cal Welf & Inst Code § 11350. Id. at 1498. This statute allows the county, without regard to the assignment of rights provided by the AFDC statutory scheme (42 US § 602(a)(26) [and codified in California law at Cal Welf & Inst Code § 11477(a)]), to recover from the noncustodial parent any AFDC disbursements received by the custodial parent. Because this statute, and not Mrs. Ramirez's assignment, was the source of Mr. Ramirez's debt to the county, the debt was an ordinary, dischargeable debt. Id.

Applying the Ramirez holding to the facts of the instant case yields similar results. Because there was no court order establishing a duty on the part of Mr. Visness to make support payments to Mrs. Visness, at the time Mrs. Visness applied for AFDC, she had no "accrued rights" to assign. By the same reasoning, there never came into being a "debt to a spouse or child," as required by 11 USC § 523(a)(5). Instead, when the County eventually entered into a stipulated judgment against Mr. Visness for the reimbursement amount now at issue, it must have done so pursuant to Cal Welf & Inst Code § 11477(a). This was an ordinary debt, not derived from Mrs. Visness's AFDC-assignment, and was therefore dischargeable.

C

Appellant has attempted to avoid the holding of Ramirez by suggesting that subsequent statutory amendments have rendered the decision inapplicable to the instant case. In addition to its discussion of "accrued rights," the Ramirez court also noted another reason for finding the debt in that case to be dischargeable: the "in connection with" requirement of § 523(a)(5 discussed

above. See supra part A. At the time Ramirez was decided, § 523(a)(5) stated that a debt would be nondischargeable only if it arose in connection with a separation agreement, divorce decree, or property settlement agreement; as appellant has duly noted, the fourth source, "other order of court," was not yet a part of the statute. Ramirez, 795 F2d at 1496. The Ramirez court observed that since the debt involved in that case did not arise from a separation agreement, divorce decree, or property settlement agreement, it could not meet the "in connection with" requirement of § 523(a)(5). Id.

Appellant has argued that the subsequent addition of the "other order of court" language to 11 USC § 523(a)(5) precludes application of the Ramirez holding to the instant case, since appellant did obtain an order against Mr. Visness. However, a closer examination exposes the fallacy of this assertion. Because the facts of Ramirez indicated a lack of any of the three "in connection with" sources, it was a quick and simple matter for the court to dispose of the nondischargeability argument by pointing to this requirement of § 523(a)(5). Id. But this manner of disposition certainly was not necessary for the court to arrive at the conclusion it reached; after all, § 523(a)(5) imposes two other prerequisites to finding an assigned debt nondischargeable -- a debt owed to a spouse or child and the possession by the spouse or child of "accrued rights." Therefore, the court could have just as easily, and just as legitimately, disposed of the argument by doing as the bankruptcy court did in the instant case -- highlighting that there never existed a "debt to a spouse or child." In sum, the "other order of court" language added to § 523(a)(5) is of no avail to appellant County; although there was an order in the instant case establishing a debt owed to the County, under California law, no debt was

ever owed to a spouse or child, and neither spouse nor child possessed any "accrued" rights at the time of assignment. See supra pp 9-10.

D

Appellant's most persuasive argument is that in finding the debt dischargeable, the Ramirez court only considered the "accrued rights" the mother possessed at the time of assignment, failing to appreciate the "accrued rights" the children may have held in their own right. Appellant has cited extensive authority for the proposition that a child, from the moment of birth, is owed a support right from both parents. Therefore, appellant posits that a child's right to support accrues automatically, without the need for a court order. Appellant thus argues that when Mrs. Visness applied for AFDC, she assigned to the county her children's accrued rights to support. This, in turn, it is suggested, makes the debt nondischargeable.

The court agrees with appellant that when the custodial parent assigns "rights" pursuant to 42 USC § 602(a)(26), she assigns all accrued rights which either she or her children possess. The court does not, however, find the remainder of appellant's argument convincing.

First, contrary to appellant's contention, it appears that the Ramirez court may, in fact, have considered the accrued rights possessed by children. Concededly, that court's opinion speaks primarily about the mother's right to reimbursement, and the California state policy against any obligation on the part of one parent to reimburse the other absent a court order. But the Ramirez court does cite Amie v Superior Court, 99 Cal App 3d 421 (1979), for the proposition that noncustodial parents have never been required to reimburse the custodial parent or their children. Ramirez,

795 F2d at 1497. The Amie case is also cited for the fact that as of the date of that case, no child had ever sued in his own right for reimbursement from a noncustodial parent. Id. Therefore, it seems quite possible that in arriving at its holding, the Ramirez court did consider the accrued rights, if any, of children.

Second, if this court were to agree with appellant and hold that children have accrued rights even without a court order, and that the Ramirez court failed adequately to consider this point, the Ramirez opinion would be eviscerated. Since these cases involve AFDC (Aid to Families with Dependent Children), such a ruling would mean that every AFDC/bankruptcy case would result in a nondischargeable debt. This court is not prepared to take so drastic a step on such scant evidence that the Ninth Circuit failed to consider an argument.

II

Appellant has raised many valid policy reasons why debts such as those involved here should not be dischargeable in bankruptcy. The fact that other circuits are in agreement with appellant's sentiments adds force to the points it makes. Unfortunately, this court can do little in response. To the extent that appellant seeks a different outcome on the issues posed by this case, it must direct its efforts to the Ninth Circuit. Until then, this court, like the bankruptcy court, is obliged to follow existing law. The bankruptcy court's denial of appellant's summary judgment motion is therefore **AFFIRMED**.

IT IS SO ORDERED.

VAUGHN R. WALKER
United States District Judge

In the Matter of Hulbert Eugene STOVALL, a/k/a Gene Stovall, Bankrupt-Appellant.

No. 82-3025.

United States Court of Appeals, Seventh Circuit.

Submitted Oct. 18, 1983

Decided Nov. 28, 1983.

Before CUDAHY, POSNER and FLAUM, Circuit Judges.

CUDAHY, Circuit Judge.

Appellant challenges the decision of the Bankruptcy Court that his child support obligation, which had been assigned to the Illinois Department of Public Aid, was not dischargeable in bankruptcy. For the reasons stated below, we affirm.

The relevant facts in this case were stipulated by the parties. In 1974, appellant, Eugene Stovall, and his wife separated prior to the birth of their fourth child. At that time, Mrs. Stovall applied for and received Aid to Families with Dependent Children (AFDC) through the Illinois Department of Public Aid; she has received such aid continuously since then. In 1975, the Stovalls were divorced. As part of the divorce action, appellant was ordered to pay to Mrs. Stovall $80.00 per week in child support, commencing on October 31, 1975. When appellant filed his bankruptcy petition in 1982, he had accumulated an arrearage of $16,690.00 under the child

support order. By that same date, the Illinois Department of Public Aid had paid to Mrs. Stovall a sum in excess of $24,000.00 in AFDC benefits.

The effect of a discharge in bankruptcy on amounts the debtor owes for child support is governed by 11 U.S.C. § 523(a)(5).[1] Debts which are owed to a spouse, former spouse or child of the debtor are not dischargeable unless they have been assigned. Child support debts which have been assigned pursuant to section 402(a)(26) of the Social Security Act, 42 U.S.C. § 602(a)(26), are also not dischargeable. Appellant acknowledges that his child support obligation and the resultant debt have been assigned to the Illinois Department of Public Aid by force of Ill.Rev.Stat., ch. 23, § 10-1.[2] However, he argues that this debt was

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1. 11 U.S.C. § 523. Exceptions to discharge.

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt—

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or property settlement agreement, but not to the extent that—

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act).

2. Illinois Rev.Stat. ch. 23, § 10-1

By accepting financial aid under this Code, a spouse or a parent or other person having custody of a child shall be deemed to have made assignment to the Illinois Department for aid under Articles III, IV, V and VII or to a local governmental unit for aid under Article VI of any and all rights, title, and interest in any support obligation up to the amount of financial aid provided. The rights to support assigned to the Illinois Department or local governmental unit shall constitute an obligation

not assigned pursuant to 42 U.S.C. § 602(a)(26) and that therefore it is dischargeable.

Appellant bases his argument on the language of 42 U.S.C. § 602(a)(26) which reads, in relevant part, as follows:

> . . . each applicant or recipient will be required—(A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed. . . .

Appellant contends that this language refers only to the actual moneys that 1) are due to the aid recipient or other designated person and 2) have accrued at the time of the assignment. Thus, in his view, all that is assigned pursuant to this statute are those sums which are in arrears at the time the aid recipient makes an assignment to the state agency. This argument is without merit.

"[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). Reading of the plain language of the statute shows that it refers to "*rights* . . . which have accrued," not to actual support moneys owed at the time of assignment

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owed the State or local governmental unit by the person who is responsible for providing the support, and shall be collectible under all applicable processes.

(emphasis supplied). Among other things, the use of the plural verb "have" is a clear indication that the second subdivision relates to "rights" rather than to "support."

[1] Congress intended the total support obligation to be assigned to the states. Section 602(a)(26) was designed to "require that a mother, as a condition of eligibility for welfare, assign her right to support payments to the State and cooperate in . . . obtaining any money or property due the family. . . ." In addition, "the assignment of support rights will continue as long as the family continues to receive assistance." S.Rep. No. 93-1356 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Adm. News 8133, 8152-53. This continuing right covers both arrearages accrued at the time of assignment and support payments which become due after the assignment. A related statute, 42 U.S.C. § 656, refers to the obligation assigned under section 602(a)(26). It makes reference in the main body of the text to "[t]he support rights assigned to the State" and provides methods for calculating the amount of the obligation. Section 656 also provides that such a debt is not extinguished by a discharge in bankruptcy. 42 U.S.C. § 656(b). When the bill implementing this section was approved by the Senate Finance Committee, the committee report stated that:

> The committee believes that a parent's obligation to support his child is not one that should be allowed to be discharged by filing for bankruptcy, and that a child support obligation assigned to a State as a condition of AFDC eligibility should not be subject to termination in that way.

Summary, *reprinted in* 1981 U.S. Code Cong. & Adm. News 790. Again the discussion focuses on the whole

obligation of support which the parent owes to the child. There is no expression of Congressional intent to limit the assignment to amounts in arrears at the time of the assignment.

[2] The Social Security Regulations provide that "[a]n assignment by operation of State law which is substantially identical [to 602(a)(26)]" may be utilized to satisfy this requirement. 45 C.F.R. § 232.11(b). The Illinois statute which assigned Mrs. Stovall's rights to the state agency refers to "any and all rights, title, and interest in any support obligation." The import of this language is entirely consistent with our reading of 42 U.S.C. § 602(a)(26).

We are aware of only one other case which has addressed the argument that 42 U.S.C. § 602(a)(26) and 11 U.S.C. § 523 operate to provide an exception to discharge only for child support which is in arrears at the time of the assignment. In *In Re Wilson*, 29 B.R. 254 (Bkrtcy.D. Kansas 1983), the bankruptcy court held, as we do here, that the state law that assigned all rights to support to a state agency was an assignment pursuant to § 602(a)(26) and that the full amount owed to the state pursuant to such an assignment is not dischargeable in bankruptcy.

AFFIRMED.

11 U.S.C. § 101 provides [in relevant part]:

"**§ 101. Definitions**

In this title--

. . .

(5) 'claim' means--

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; . . . ."

11 U.S.C. § 523 provides [in relevant part]

"**§ 523. Exceptions to discharge**

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

. . .

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that--

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act, or any such debt which has been assigned to the Federal Government

or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support; . . ."

42 U.S.C. § 602 (a)(26)(A) provides [in relevant part]:

§ 602. State plans for aid and services to needy families with children; contents; approval by Secretary; records and reports; treatment of earned income advances

(a) Contents

A State plan for aid and services to needy families with children must--

"(26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required--

(A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed;

. . ."

42 U.S.C. § 656

§ 656. Support obligation as obligation to State; amount; discharge in bankruptcy

(a)(1) The support rights assigned to the State under section 602(a)(26) of this title or secured on behalf of a child receiving foster care maintenance payments shall constitute an obligation owed to such State by the individual responsible for providing such support. Such obligation shall be deemed for collection purposes to be collectible under all applicable State and local processes.

(2) The amount of such obligation shall be--
(A) the amount specified in a court order which covers the assigned support rights, or
(B) if there is no court order, an amount determined by the State in accordance with a formula approved by the Secretary, and

(3) Any amounts collected from an absent parent under the plan shall reduce, dollar for dollar, the amount of his obligation under subparagraphs (A) and (B) of paragraph (2).

(b) A debt which is a child support obligation assigned to a State under section 602(a)(26) of this title is not released by a discharge in bankruptcy under Title 11.

California Penal Code § 270 provides [in relevant part]:

§ 270. Failure to provide; parent, punishment; effect of custody; evidence: applicability of section; artificial insemination; treatment by spiritual means

If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment. If a court of competent jurisdiction has made a final adjudication in either a civil or a criminal action that a person is the parent of a minor child and the person has notice of such adjudication and he or she then willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter, medical attendance or other remedial care for his or her child, this conduct is punishable by imprisonment in the county jail not exceeding one year or in a state prison for a determinate term of one year and one day, or by a fine not exceeding two thousand dollars ($2,000), or by both such fine and imprisonment. This statute shall not be construed so as to relieve such parent from the criminal liability defined herein for such omission merely because the other parent of such child is legally entitled to the custody of such child nor because the other parent of such child or any other person or organization voluntarily or involuntarily furnishes such necessary food, clothing, shelter or medical attendance or other remedial care for such child or undertakes to do so.

. . .

"The provisions of this section are applicable whether the parents of such child are or were ever married or divorced, and regardless of any decree made in any divorce action relative to alimony or to the support of the child. A child conceived but not yet born is to be deemed an existing person insofar as this section is concerned.

. . ."

California Family Code § 150 provides

"**§ 150. Support**

'Support' refers to a support obligation owing on behalf of a child, spouse, or family, or an amount owing pursuant to Section 11350 of the Welfare and Institutions Code. It also includes past due support or arrearage when it exists. 'Support,' when used with reference to a minor child or a child described in Section 3901, includes maintenance and education."
(Stats. 1992, c. 162 (A.B. 2650), § 10, operative Jan. 1, 1994. Amended by Stats. 1993, c. 219 (A.B. 1500), § 82.)"

The first two sentences of this section continue without change former California Civil Code § 4390(h).

California Family Code § 3900 provides

§ 3900. Equal duty of parents to support child

Subject to this division, the father and mother of a minor child have an equal responsibility to support their child in the manner suitable to the child's circumstances. (Stats. 1992, c. 162 (A.B. 2650), § 10, operative Jan. 1, 1994.)"

This section continues without substantive change former Civil Code § 196 (a).

California Family Code § 3951 provides:

"**§ 3951. Circumstances where liability is not incurred**

(a) A parent is not bound to compensate the other parent, or a relative, for the voluntary support of the parent's child, without an agreement for compensation.

(b) A parent is not bound to compensate a stranger for the support of a child who has abandoned the parent without just cause.

(c) Nothing in this section relieves a parent of the obligation to support a child during any period in which the state, county, or other governmental entity provides support for the child.
(Stats. 1992, c. 162 (A.B. 2650), § 10, operative Jan. 1, 1994.)"

This section continues former California Civil Code § 208 without substantive change.

California Family Code § 4000 provides:

"**§ 4000. Actions to enforce parent's duty to support**

If a parent has the duty to provide for the support of the parent's child and willfully fails to so provide, the other parent, or the child by a guardian ad litem, may bring an action against the parent to enforce the duty.
(Stats. 1992, c. 162 (A.B. 2650), § 10, operative Jan. 1, 1994.)"

This Code section continues former California Civil Code § 4703 without substantive change.

California Family Code § 4001 provides

"§ 4001. Order for support

In any proceeding where there is at issue the support of a minor child or a child for whom support is authorized under Section 3901 or 3910, the court may order either or both parents to pay an amount necessary for the support of the child.
(Stats. 1992, c. 162 (A.B. 2650), § 10, operative Jan. 1, 1994.)"

Section 4001 continues the first sentence of former California Civil Code § 4700(a) without substantive change.

"§ 4002. Enforcement of right of support; reimbursement of county

(a) The county may proceed on behalf of a child to enforce the child's right of support against a parent.

(b) If the county furnishes support to a child, the county has the same right as the child to secure reimbursement and obtain continuing support. The right of the county to reimbursement is subject to any limitation otherwise imposed by the law of this state.

(c) The court may order the parent to pay the county reasonable attorney's fees and court costs in a proceeding brought by the county pursuant to this section.
(Stats. 1992, c. 162 (A.B. 2650), § 10, operative Jan. 1, 1994.)"

This section continues former California Civil Code § 248 without substantive change.

California Family Code § 4009 provides

"**§ 4009. Retroactivity of order**

. . .

Section 4009 continues the sixth sentence of former Civil Code Section 4700(a) without substantive change to the extent that sentence related to the making of the order for child support. See also Section 3653 (retroactivity of order modifying or terminating child support order). For a provision relating to spousal support, see Section 4333 (retroactivity of spousal support order)."

California Family Code § 4053 provides

"**§ 4053. Implementation of statewide uniform guidelines; principles to be followed by court**

In implementing the statewide uniform guideline, the courts shall adhere to the following principles:

(a) A parent's first and principal obligation is to support his or her minor children according to the parent's circumstances and station in life.

(b) Both parents are mutually responsible for the support of their children.

(c) The guideline takes into account each parent's actual income and level of responsibility for the children.

(d) Each parent should pay for the support of the children according to his or her ability.

(e) The guideline seeks to place the interests of children as the state's top priority.

(f) Children should share in the standard of living of both parents. Child support may therefore appropriately

improve the standard of living of the custodial household to improve the lives of the children.

(g) Child support orders in cases in which both parents have high levels of responsibility for the children should reflect the increased costs of raising the children in two homes and should minimize significant disparities in the children's living standards in the two homes.

(h) The financial needs of the children should be met through private financial resources as much as possible.

(i) It is presumed that a parent having primary physical responsibility for the children contributes a significant portion of available resources for the support of the children.

(j) The guideline seeks to encourage fair and efficient settlements of conflicts between parents and seeks to minimize the need for litigation.

(k) The guideline is intended to be presumptively correct in all cases, and only under special circumstances should child support orders fall below the child support mandated by the guideline formula.

(l) Child support orders must ensure that children actually receive fair, timely, and sufficient support reflecting the state's high standard of living and high costs of raising children compared to other states."
(Added by Stats. 1993, c. 219 (A.B. 1500), § 138.)

This section continues former California Civil Code § 4720 (a)(3) without substantive change.

When this action arose, California Welfare and Institutions Code § 11350 provided:

"§ 11350. **Separation or desertion; liability for support of family**

In any case of separation or desertion of a parent or parents from a child or children which results in aid under this chapter being granted to such family, the noncustodial parent or parents shall be obligated to the county for an amount equal to:

(a) The amount specified in an order for the support and maintenance of such family issued by a court of competent jurisdiction; or in the absence of such court order,

(b) The amount of aid paid to the family during such period of separation or desertion limited by such parent's reasonable ability to pay during that period in which aid was granted, and

(c) Such obligation shall be reduced by any amount actually paid by such parent during such period of separation or desertion for the support and maintenance of such family.

The district attorney shall take appropriate action pursuant to this section in the superior court of the county which provided aid under this chapter.

The court may order the defendant to pay the county attorney fees and court costs, based on such defendant's reasonable ability to pay, in any proceeding brought by the county pursuant to this section.

In making the determination of the defendant's reasonable ability to pay attorney's fees and court costs under this section, the court shall be limited to the following considerations:

(a) The wealth and income of the defendant;
(b) The current ability of the defendant to earn;
(c) The age of the defendant."
(Add by Stats. 1975, c. 924, p. 2032, § 5, eff. Sept. 20, 1975.)

California Welfare and Institutions Code § 11350 now provides:

"§ 11350. **Separation or desertion; liability for support of family**

(a) In any case of separation or desertion of a parent or parents from a child or children which results in aid under this chapter being granted to that family, the noncustodial parent or parents shall be obligated to the county for an amount equal to the following:

(1) The amount specified in an order for the support and maintenance of such family issued by a court of competent jurisdiction; or in the absence of such court order, the amount specified in paragraph (2).

(2) The amount of support which would have been specified in an order for the support and maintenance of the family during the period of separation or desertion provided that any such amount in excess of the aid paid to the family shall not be retained by the county, but disbursed to the family.

(3) The obligation shall be reduced by any amount actually paid by such parent directly to the custodian of the child or to the district attorney of the county in which the child is receiving aid during the period of separation or desertion for the support and maintenance of the family.

(b) The district attorney shall take appropriate action pursuant to this section * * * as provided in subdivision (l) of Section 11475.1. The district attorney may establish liability for child support as provided in subdivision (a) when public assistance was provided by another county or by other counties.

(c) The amount of the obligation established under paragraph (2) of subdivision (a) shall be determined by using the appropriate child support guidelines currently in effect. If one parent remains as a custodial parent, the guideline support shall be computed in the normal manner. If neither parent remains as a custodial parent, the support shall be computed by combining the noncustodial parents' incomes and placing the figure obtained in the column for noncustodial parent. A zero shall be placed in the column for the custodial parent and the amount of guideline support resulting shall be proportionately shared between the parents as directed by the court. The parents shall pay the amount of support specified in the support order to the district attorney.
(Amended by Stats. 1991, c. 110 (S.B. 101), § 20; Stats. 1994, c. 1269 (A.B. 2208), § 62.3.)"

California Welfare and Institutions Code § 11475.1 provides [in relevant part]:

"11475.1. **County single organizational units; actions of district attorney; time for completion of actions; notice of enforcement services; order for temporary support; cooperative arrangements; wage withholding; time for response to assistance requests**

(a) Each county shall maintain a single organizational unit located in the office of the district attorney which shall have the responsibility for promptly and effectively establishing, modifying, and enforcing child support obligations, including medical support, enforcing spousal support orders established by a court of competent jurisdiction, and determining paternity in the case of a child born out of wedlock. The district attorney shall take appropriate action, both civil and criminal, to establish, modify, and enforce child support and when appropriate enforce spousal support orders when the child is receiving public assistance, including Medi-Cal, and, when appropriate, to take the same actions on behalf of a child who is not receiving public assistance, including Medi-Cal."

California Welfare and Institutions Code § 11350.1 provides [in relevant part]:

"11350.1. **Action for support**

(a) Notwithstanding any other statute, in any action brought by the district attorney for child support of a minor child or children, the action may be prosecuted in the name of the county on behalf of the child, children, or caretaker parent. The caretaker parent shall not be a necessary party in the action but may be subpoenaed as a witness. In an action under this section there shall

be no joinder of actions, or coordination of actions, or cross-complaints, and the issues shall be limited strictly to the question of paternity, if applicable, and child support, including an order for medical support. A final determination of parentage may be made in any action under this section as an incident to obtaining an order for support. An action for support or paternity pursuant to this section shall not be delayed or stayed because of the pendency of any other action between the parties. Judgment in an action brought pursuant to this section, and in an action brought pursuant to Section 11350, if at issue, may be rendered pursuant to a noticed motion, which shall inform the defendant that in order to exercise his or her right to trial, he or she must appear at the hearing on the motion. . . ."

California Welfare and Institutions Code § 11477 provides [in relevant part]

"§ 11477. **Conditions for aid eligibility; cooperation, questions prohibited; protective payments**

As a condition of eligibility for aid paid under this chapter, each applicant or recipient shall:

(a) Assign to the county any rights to support from any other person such applicant may have in their own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and which have accrued at the time such assignment is made. Receipt of public assistance under this chapter shall operate as an assignment by operation of law. An assignment of support rights to the county shall also constitute an assignment to the state. If support rights are assigned pursuant to this subdivision, the assignee may become an assignee of record by the district

attorney or other public official filing with the court clerk an affidavit showing that an assignment has been made or that there has been an assignment by operation of law. This procedure does not limit any other means by which the assignee may become an assignee of record. . . ."

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No. 95-664

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

COUNTY OF CONTRA COSTA, *Petitioner,*

v.

DALE H. VISNESS, *Respondent,*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Pursuant to Rules 37.5 and 37.6 of the Rules of the Supreme Court of the United States, the Office of District Attorney of the City and County of San Francisco, as a political subdivision of the State of California, files this brief as *amicus curiae* in support of a request by the Attorney General of the State of California that this Court issue a Writ of Certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit, filed July 12, 1995.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in *In re Visness*, 57 F.3d 775 (9th Cir. 1995) is set forth in the Appendix of the petition filed by the Attorney General of the State of California. In *Visness* petitioner had requested the Ninth Circuit to reconsider its earlier decision in *In re Ramirez*, 795 F.2d 1494 (9th Cir. 1986), cert. den. 481 U.S. 1003 (1987), on two grounds: (1) the section of the Bankruptcy Code excepting a debt for unpaid child support from discharge had been twice amended since the bankruptcy court rendered its decision finding that section inapplicable to support judgments entered pursuant to California Welfare and Institutions Code section 11350, and (2) the Court had misconstrued section 456(b) of the Social Security Act which precludes the discharge of a "debt which is a child support obligation assigned to a State." 42 U.S.C. §656(b). As to the first issue, the Ninth Circuit in *Visness* held that the statutory changes in the Bankruptcy Code did not affect its prior holding in *Ramirez* and, as to the second, it held that the panel hearing the matter was bound by the holding of the previous panel. Crucial to the analysis of *amicus* is the statement by the Ninth Circuit that "**(t)his panel is 'bound by decisions of prior panels unless an en banc decision, Supreme Court decision, or subsequent legislation undermines those decisions.'**" *In re Visness, supra,* at 57 F.3d 778 (bold type added). On July 25, 1995 the Ninth Circuit declined to grant a hearing en banc.

INTEREST OF *AMICUS CURIAE*

As the agency charged with the enforcement of child support in this political subdivision, the Office of the District Attorney of the City and County of San Francisco represents the interests of the People of the State of California in collecting debts for child support which have been assigned to the county and in collecting support for custodial parents whose children are not receiving public assistance.[1] The district attorney of each county in California has similar responsibilities.[2] All district attorneys therefore have an immediate and significant interest in the dischargeability of debts in bankruptcy which are in the nature of support and assigned to the county.

San Francisco is a medium size county in the State of California and is responsible for the administration of approximately 33,000 child support cases.[3] In this caseload obligated parents owe approximately $14.1 million in uncollected judgments which are based on actions brought pursuant to California Welfare and Institutions Code § 11350. This figure represents 11% of the total collectible and unpaid support judgments in the district attorney's office which have been assigned to the county pursuant to section 402(a)(26) of the Social Security Act (42 U.S.C. § 602(a)(26)). It is judgments entered pursuant section

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1. California Welfare and Institutions Code §§ 11475.1, 11487.2.

2. California Welfare and Institutions Code § 11475.1.

3. A "case" may be defined simply as a support action for family group consisting of a child (or siblings living together), a custodian, and an absent parent.

in proceedings brought under Title 11 of the United States Code.[4/]

While California does not keep statistics on a statewide basis which distinguish between amounts owing under judgments rendered pursuant to section 11350 and amounts of assigned support which have accrued under other applicable law, it does collect information detailing the total unpaid assigned support in the State. California, like all other states and United States territories, certifies the support arrearage it is enforcing to the Internal Revenue Service annually for collection from the tax refunds of obligated parents.[5/] Currently, such parents owe approximately $6.73 billion in unpaid support obligations which are being enforced in California by all district attorneys under the federal child support enforcement program. 42 U.S.C. §§ 651 *et seq.* Of this amount, approximately $4.75 billion has been assigned to the counties as a condition of receipt of public assistance. *Amicus* has no reason to believe that San Francisco is unique or aberrant in the percentage of its total assigned support collectibles which are based on judgments rendered pursuant to section 11350. Thus, by

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4. *Amicus* notes that Welfare and Institutions Code § 11350 was amended effective January 1, 1992 to specify that the child support which forms the basis of the judgment is to be calculated pursuant to state child support guidelines as mandated by federal law. Welfare and Institutions Code § 11350(c); 42 U.S.C. § 667. The amendment further specifies that all amounts collected on the judgment in excess of the public assistance paid to the family shall be disbursed to the family. Welfare and Institutions Code § 11350(a)(2). *Amicus* declines to speculate as to the dischargeability of debts for child support entered pursuant this statute as amended. Section 11350 as it read prior to the 1992 amendments and as applied in the Court below is discussed in footnote 11, *infra*.

5. 42 U.S.C. § 664; 45 C.F.R. §§ 302.60, 303.72.

extrapolation, 11% of the assigned support in California alone, or $522,500,000, is based on judgments rendered pursuant to section 11350 and consequently at risk of discharge in the Ninth Circuit.

Attached, as Appendix I, is a copy of the amounts of support arrearages certified to the Internal Revenue Service for tax intercept collection by thirty five jurisdictions through September 12, 1995. The table reflects the name of the reporting jurisdiction, the number of cases certified for the tax intercept, and the total arrearage. It also reflects how much of the arrearage is assigned to the state (AFDC) or not assigned (NAFDC). This table was provided to *amicus* by the Department of Health and Human Services, Office of Child Support Enforcement (OSCE). Of the jurisdictions situated in the Ninth Circuit, only Hawaii, Guam, and the North Mariana Islands have not yet certified their support arrearages for the IRS intercept program. The table shows that obligated parents currently owe $6.7 billion in assigned support in seven reporting jurisdictions in the Ninth Circuit.[6/]

As a practical matter actions for support cannot be filed against noncustodial parents until their identity

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6. Note that the following jurisdictions in the Ninth Circuit, *inter alia*, have statutes similar to California Welfare and Institutions Code § 11350 which provide for the recovery of aid paid prior to the date an action for support is filed against a noncustodial parent: Alaska (Alaska Stats. § 25.27.120); Arizona (Ariz. Rev. Stat. § 46-295); Hawaii (Haw. Rev. Stat. §346-37.1; Idaho (Idaho Code § 56-203B); Montana (Mont. Code Ann. § 40-5-223); Nevada (Nev. Rev. Stat. § 425.360(1)); Oregon (Ore. Rev. Stat. §§ 416.410, 416.415--amended, Ore. Laws 1995, Ch. 514, §§ 8-19); Washington (Wash. Rev. Stat. § 74.20(A).055). *Amicus* declines to speculate on how much of the assigned support in these jurisdictions has accrued under the above cited statutes as distinguished from the accrual of assigned support under other orders or judgments. However, based upon experience in California, such accruals cannot be insubstantial.

and whereabouts are known. Thus, there is often a significant time gap between the date public assistance is granted to a child and the date a complaint for support is filed.[7] That gap is bridged under California law by section 11350 of the Welfare and Institutions Code which provides for a support judgment for the period preceding the date the support action is filed. In California the prefiling support recovery period is limited to three years.[8]

In addition to actions involving the support of families living in San Francisco, the district attorney is required to use reciprocal enforcement of support procedures either to request another state to enforce a support obligation against a resident parent on behalf of that parent's children who live in San Francisco or to enforce a support obligation against a San Francisco

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7. Actions to establish support when paternity is at issue must be *filed* within ninety days of *locating* the absent parent. 45 C.F.R. § 303.5(a)(1). Most cases filed by the district attorney require the establishment of paternity and therefore are not filed prior to locating the putative father. And even if the district attorney were able to file a support action immediately upon the granting of public assistance, the action would be dismissed if the noncustodial parent-defendant could not be served in three years. California Code of Civil Procedure §§ 583.210, 583.250. If the noncustodial parent were subsequently located, the new support action would necessarily seek support for a period preceding the filing date of the new action. Moreover, if the custodial parent fails to provide sufficient information to identify the noncustodial parent or misidentifies such parent, additional delays in filing a support action against the proper noncustodial parent would occur. Section 11350 is therefore designed to prevent the loss of recoverable support when the custodial parent misidentifies or declines to identify the noncustodial parent, or because the noncustodial parent successfully evades service of process or conceals his whereabouts.

8. *Amie* v. *Superior Court of Riverside County* (1979) 99 Cal.App.3d 421, 427, 160 Cal.Rptr. 271, 274.

parent whose children reside in another state. California Family Code §§ 4800-4854; 42 U.S.C. § 454; 45 C.F.R. § 303.7. Besides the usual support obligations enforceable under the reciprocal process, a state or political subdivision has the same right as a custodial parent or child to bring a reciprocal enforcement action against a noncustodial parent when that entity has supported the child "for the purpose of securing reimbursement for support furnished . . . ." California Family Code § 4821.

Because of this responsibility to enforce obligations to reimburse a political subdivision for support furnished to children--usually in the form of public assistance under the Aid to Families With Dependent Children (AFDC) program--the district attorney of a county will be both collecting reimbursement for other states and receiving reimbursement collected by other states. And since there is a clear conflict between the Courts of Appeal for the Ninth and Seventh Circuits[9/] and between various districts which have ruled on the issue of the dischargeability of reimbursement obligations, the local district attorney will be required to apply two standards in the enforcement of such judgments against debtors in bankruptcy, dependent solely on the location where the obligated debtor-parent has filed a petition in bankruptcy. This contradictory result is difficult to explain to an obligated parent and to justify in a system theoretically designed to treat all debtors equally. Such a conflict certainly encourages a knowledgeable debtor to shop for his or her bankruptcy forum carefully. A parent obligated to pay a $50,000 reimbursement judgment may find a temporary change in residency to a

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9. See *In re Stovall*, 721 F.2d 1133 (7th Cir. 1983).

state within the Ninth Circuit well worth the cost of relocation.

ARGUMENT

I.

THE OPINION OF THE NINTH CIRCUIT MISCONSTRUES SECTION 456(b) OF THE SOCIAL SECURITY ACT AND IS IN CONFLICT WITH THE SEVENTH CIRCUIT.

The argument *amicus* wishes to advance is simple and straightforward. It is rests on the meaning which Congress reasonably attributed to the words "accrued rights." In *Ramirez, supra,* 795 F.2d at 1497, the Court noted that a debtor is not discharged from debts which have been assigned to a State under section 402(a)(26)[10] of the Social Security Act. 42 U.S.C. 656(b). The Court further noted that section 402(a)(26) provides that "as a condition of eligibility for aid, each applicant must 'assign to the State any rights to support . . . which *have accrued* at the time the assignment is executed (emphasis original)." *Ibid.* The Court then concluded that proceedings brought pursuant to California Welfare and Institutions Code section 11350 are not be actions based on the accrued rights of applicants or recipients of aid.[11] The Court held that

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10. 42 U.S.C. § 602(a)(26). In pertinent part reads as follows: "as a condition of eligibility for aid, each applicant or recipient will be required--(A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed. . . ."

11. California Welfare and Institutions Code § 11350 as it was written and as it was interpreted by the Ninth Circuit in *Ramirez* and *Visness* imposed liability on an absent parent for public

the custodial parent-applicant had no *accrued rights* to assign to the state under California law. This conclusion is based solely on the principle that one parent does not have a claim against the other for reimbursement for money paid out in support of their child prior to the issuance of an order of the court directing the other parent to pay support. *Ibid.*

Simply stated, *Ramirez* concludes that in order to qualify as an exception to discharge under Title 11 as a debt based on "rights to support which have accrued," such debt must be a liquidated claim for money recoverable by the custodial parent against the noncustodial parent, or it must be based on a personal retroactive cause of action against the noncustodial parent by the custodial parent. Such debts are commonly referred to as support arrearages. *Amicus*

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assistance paid to his or her children. The maximum liability was the actual amount of aid paid, but this amount was reduced by several factors. Prior to 1992 section 11350 read as follows: "In the case of a separation or desertion of a parent or parents from a child or children which results in aid under this chapter being granted to such family, the noncustodial parent or parents shall be obligated to the county for an amount equal to (a) The amount specified in an order for the support and maintenance of such family . . ., or in the absence of such order, (b) The amount of aid paid to the family during such period of separation or desertion *limited by such parent's reasonable ability to pay during that period* in which aid was granted (emphasis added) . . . ." This provision therefore operated to impose the same liability as an ordinary child support order for the aid period which preceded the date the action for support was brought. Section 11350 was amended in 1991 to ***mandate*** that the support judgment for the reimbursement period be computed under the same statewide child support guidelines which are used to compute an ordinary support order. Stats. 1991, c. 110, § 20. Even prior to this amendment, however, courts deemed use of the statewide child support guidelines in calculating reimbursement to be necessary. *County of Contra Costa v. Lemon*, 205 Cal.App.3d 683, 689, 252 Cal.Rptr. 455, 459 (1988).

submits that this conclusion is erroneous and that "accrued rights" to support mean nothing more than an existing right of action of one parent to sue the other for support *at the time of the assignment.* Had Congress wished to limit the assignment to debts recoverable by the applicant or recipient of aid ***under State law***, it could have easily said so.[12/] However, under the specific wording of the statute, what are assigned are "rights to

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12. Clearly, Congress contemplated that the support rights which are assigned to the State under section 402(a)(26) of the Social Security Act include, "if there is no court order, an amount determined by the State in accordance with a formula approved by the Secretary . . . ." 42 U.S.C. § 656(a)(2)(B). It thus chose to use a *federal* standard in defining what rights were assigned to the State under section 402(a)(26). Without citation to authority, *Ramirez* holds that the "determination of child support rights is a matter of state statutory and common law." *In re Ramirez, supra,* at 795 F.2d 1497. Whatever relevance this conclusion may have in the abstract, it certainly cannot be applied in a manner which ignores the specific language of a federal statute. Thus, no matter what rights California gives a custodial parent to enforce a support obligation, the rights which that parent assigns are "rights" as defined by federal law. *Cf.* phrases Congress used to describe the type of liquidated debts which the *Ramirez* and *Visness* decisions hold are necessary to be considered nondischargeable: "delinquent child support payments" [42 U.S.C. § 665(a)(1)]; "overdue support owed by such absent parent" [42 U.S.C. § 666(a)(3)(A)]; "any payment or installment of support under any child support order" [42 U.S.C. § 666(a)(9)]; "arrearages" [42 U.S.C. § 666(b)(1)]; "payments which the absent parent has failed to make under a support order" [42 U.S.C. § 666(b)(3)(B)]; "the term 'overdue support' means the amount of a delinquency pursuant to an obligation determined under a court order . . . for support . . . of a minor child which is owed to or on behalf of such child" [42 U.S.C. § 666(e)]. Obviously Congress was not at a loss for words if it wanted to describe "accrued support rights" in the same way such rights were defined by the *Visness* and *Ramirez* decisions. Thus, by use of the words "rights to support" which "have accrued," Congress must have intended a broader definition of the assignment than "support arrearages."

support." *Amicus* maintains that such a "right" is the right to seek a support order at the time the assignment is made. To put it otherwise, *Ramirez* necessarily concludes that a custodial parent has no "*right to support*" from the other parent which has "accrued" on the date he or she applies for public assistance. If this conclusion be true, then it is equally true that such rights to support are also *not rights which have accrued* on the date an action for support is filed. Indeed, if the holding of the Ninth Circuit were carried to its logical conclusion, the district attorney would never be able to bring a support action against a non-custodial parent of a child based upon the assignment of accrued support rights to the county since no rights of support could ever "have accrued."

California law on this point is clear and unequivocal. The AFDC program allows a custodial parent to apply for aid for a child which will be granted if specific eligibility requirements are met.[13] The child must therefore be in existence. In California both parents have a obligation to support their children. California Family Code § 3900. It is the most basic and primary obligation recognized in this State. California Family Code § 4053(a). All children have an enforceable action against parents who do not provide support. California Family Code § 4000. And this "right of support" may be enforced by a county on behalf of such children. California Family Code § 4002(a). Finally, when "the county furnishes support to a child, it has the same right as the child to secure reimbursement and obtain continuing support." California Family Code § 4002(b).

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13. 42 U.S.C. §§ 601 *et seq.*

Undeniably, a child or a county has a *right* to seek support from a noncustodial parent. The only question remaining to be answered is when, under the statutory language of section 402(a)(26) of the Social Security Act, such a right to support *accrues*. *Amicus* submits that such accrual begins with the existence of the child. Arguably, in California such a right to support commences on the date of conception. California Penal Code § 270; see also, Family Code § 7633. In any event *amicus* maintains that a "right" to support has certainly "accrued" on the date a custodial parent applies for public assistance for an existing child. On that date no one could deny that a child has an enforceable right of support and an inevitable cause of action under California law to enforce this right. Family Code § 4000.[14] But what *Ramirez* concludes, and what *Visness* refused to reconsider, is that if the custodial parents or children do not or cannot exercise such "rights" to support immediately by obtaining a court order, they will have no "rights" to assign to the county because no such rights "have accrued." This construction confuses the right of a custodial parent or child to sue for reimbursement with a child's right to obtain support.

"The term 'accrue' as applied to a cause of action, means to arrive; to commence; to come into existence; to become a presently enforceable demand." *Van Hook v. Southern California Waiters Alliance*, 158 Cal.App.2d 556, 323 P.2d 212, 217 (1958). A cause of action "accrues" at the moment when there is a legal right to sue on it. *Weinstock v. Eissler*, 224 Cal.App.2d 212, 36 Cal.Rptr. 537, 549 (1964). Thus, the conclusion

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14. The predecessor of this provision in effect at the time the children in the *Visness* and *Ramirez* cases were granted public assistance was substantially the same. California Civil Code §§ 241, 248, repealed by Stats. 1992, ch. 162, § 2, operative Jan. 1, 1994.

in *Ramirez* that a child or parent has no "accrued" right to support which is assignable to the county until the court has made a support order is clearly erroneous. Moreover, it rewards the noncustodial parent who is successful in evading service of process or in concealing his whereabouts.

The interpretation *amicus* ascribes to the meaning of "accrued rights" is certainly not unique. It is a present and existing right to obtain a support order, not a debt already accumulated under such an order. It does nothing more than distinguish between an existing right to enforce a support obligation and one which may accrue in the future. *In re Ramirez*, *supra*, at 795 F.2d 1501 (Ferguson, J., dissenting); *Matter of Stovall, supra,* at 721 F.2d 1135; *State of Oregon v. Richards*, 45 B.R. 811, 816 (D.Ore. 1984); *In re Jones*, 94 B.R. 99, 102 (Bkrtcy.N.D.Ohio 1988); *In re Walden*, 60 B.R. 641, 645 (Bkrtcy.M.D.Fla. 1986); *In re McLean*, 59 B.R. 675, 680 (Bkrtcy.E.D.Va. 1986); *In re Wilson*, 29 B.R. 254, 257 (Bkrtcy.D.Kan. 1983).

What Congress did ***not*** intend to be assigned was a right to support which may accrue in the future. Thus, when aid terminates because the parents have reconciled, there is no assignment to the State of any future right to support which the custodial parent or child may subsequently obtain. There is thus no ongoing obligation to reimburse the State for aid paid beyond that which had accrued when aid terminated. Likewise, in States where there was no right to support for a child until birth, the assignment did not create a new cause of action for prenatal support. And in States where support arrearages were subject to a retroactive modification based on then existing criteria, the right such arrearages did not accrue until they were reduced to a judgment by a court. Thus, in all cases it was the "right" to obtain money for support, and not a right to

money already owed which constituted the crux of the assignment. If the custodial parent or child had a right to secure an enforceable judgment or order to pay money for support *on the date the assignment was executed,* then so did the State. If the right to seek such a judgment had not accrued to the parent and child, they could not assign it.

SUMMARY

In holding that Mrs. Ramirez had no accrued rights to support at the time she applied for public assistance because she did not have a support order, the Court of Appeals necessarily finds that a support right accrues *because* a support action is brought. *Amicus* urges the opposite: that a support action properly may brought because a support right already *has accrued*. What matters is that *under state law* a custodial parent has an accrued right to bring a support action at the time this parent assigns the right of support to the county. There is no corresponding requirement *under federal law* that this parent actually exercise such a right. Nondischargeability only requires the assignment of it. And thus, state law, which precludes the recovery of support by a custodial parent from a noncustodial parent without the issuance of a support order, has no relevance to the analysis of the federal law which excepts assigned and accrued rights to support from discharge.

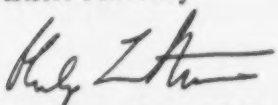
CONCLUSION

The District Attorney of the City and County of San Francisco joins the Attorney General of the State of California in urging this Court to grant his petition for the Writ of Certiorari.

Dated: November 3, 1995.

Respectfully submitted,

ARLO SMITH
District Attorney



PHILIP L. STRAUSS
Assistant District Attorney

Counsel for *Amicus Curiae*

APPENDIX I

PY-96 CASELOAD VALIDATED BY OCSE

09/12/95

	AFDC		NAFDC		TOTAL	
	CASES	ARREARAGE	CASES	ARREARAGE	CASES	ARREARAGE
ALASKA	12,011	$173,666,158	6,193	$102,744,557	18,204	$276,410,715
ARKANSAS	31,361	$138,293,692	22,089	$109,485,885	53,450	$247,779,577
ARIZONA	29,879	$280,325,750	25,424	$246,504,832	55,303	$526,830,582
CALIFORNIA	430,587	$4,753,286,576	187,661	$1,981,003,628	618,248	$6,734,290,204
CONNECTICUT	57,508	$720,188,952	15,384	$116,185,422	72,892	$836,374,374
FLORIDA	140,667	$908,186,122	91,421	$636,475,385	232,088	$1,544,661,507
GEORGIA	89,430	$488,773,810	71,281	$390,890,219	160,711	$879,664,029
IOWA	51,055	$465,165,113	22,614	$139,253,277	73,669	$604,418,390
IDAHO	15,205	$76,710,951	11,036	$76,381,276	26,241	$163,092,227
INDIANA	86,246	$704,868,641	40,280	$333,423,428	126,526	$1,038,292,069
KANSAS	36,112	$225,568,803	20,817	$134,104,281	56,929	$359,673,084
KENTUCKY	53,346	$305,085,142	29,150	$152,499,889	82,496	$457,585,031
MAINE	25,722	$212,367,686	11,177	$65,443,661	36,899	$277,811,347
MICHIGAN	217,525	$2,046,747,532	125,817	$760,271,427	343,342	$2,807,018,959
MINNESOTA	54,885	$348,331,267	27,782	$170,139,027	82,667	$518,470,294
MISSOURI	84,051	$523,543,439	47,897	$302,661,684	131,948	$826,205,123
MONTANA	8,981	$47,597,248	6,266	$42,106,380	15,247	$89,703,628
NORTH CAROLINA	77,375	$308,982,704	70,264	$335,143,048	147,629	$644,125,752
NORTH DAKOTA	9,038	$45,696,014	3,964	$19,464,573	13,002	$65,160,587
NEBRASKA	16,508	$91,927,346	14,181	$95,096,769	30,689	$187,024,115
NEW HAMPSHIRE	9,625	$55,138,286	6,777	$44,279,168	16,402	$99,417,454
NEW JERSEY	107,505	$775,623,432	64,009	$431,383,598	171,514	$1,207,007,030
NEW MEXICO	13,183	$109,647,597	3,912	$32,899,118	17,095	$142,546,715
NEVADA	11,941	$59,592,346	8,714	$70,292,603	20,655	$129,884,949
OHIO	140,982	$1,071,589,158	103,739	$797,787,669	244,721	$1,869,376,827
OKLAHOMA	31,650	$202,816,520	18,679	$120,660,402	50,329	$323,476,922
OREGON	54,243	$304,985,524	42,843	$290,224,985	97,086	$595,210,509
PENNSYLVANIA	134,915	$699,186,833	88,674	$437,988,033	223,589	$1,137,174,866
SOUTH DAKOTA	10,299	$46,479,988	5,110	$26,294,381	15,409	$72,774,369
TENNESSEE	57,585	$252,397,102	22,070	$137,578,534	79,655	$389,975,636
TEXAS	155,874	$1,126,326,099	132,468	$973,478,998	288,342	$2,099,805,097
VIRGINIA	57,273	$326,981,403	44,275	269,037,483	101,548	$596,018,886
VIRGIN ISLAND	9	$56,858	172	$1,895,332	181	$1,952,190
VERMONT	7,291	$33,962,333	2,601	$14,232,143	9,892	$48,194,476
WASHINGTON	111,679	$965,907,376	49,713	$380,733,363	161,392	$1,346,640,739
NATIONAL TOTALS:	2,431,546	$18,896,003,801	1,444,444	$10,238,044,458	3,875,990	$29,134,048,259

Supreme Court, U.S.
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No. 95-664

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

COUNTY OF CONTRA COSTA, *Petitioner,*

v.

DALE H. VISNESS, *Respondent,*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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OCTOBER TERM, 1995
No. 95-664

COUNTY OF CONTRA COSTA, *Petitioner,*

v.

DALE H. VISNESS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rules 37.5 and 37.6 of the Rules of the Supreme Court of the United States, the Office of the District Attorney of the County of Tulare, as a political subdivision of the State of California, files this brief as *amicus curiae* in support of a request by the Attorney General of the State of California that this Court issue a Writ of Certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit, filed June 12, 1995.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit *In re Visness*, 57 F.3d 775 (9th Cir. 1995) is set forth in the Appendix to the petition filed by the Attorney General of the State of California. In *Visness* petitioner had requested the Ninth circuit to reconsider its earlier decision *In re Ramirez*, 795 F.2d 1494 (9th Cir. 1986), cert. den. 481 U.S. 1003 (1987), on two grounds: (1) the section of the Bankruptcy Code excepting a debt for unpaid child support from discharge had been twice amended since the bankruptcy court rendered its decision finding that section inapplicable to support judgments entered pursuant to California Welfare and Institutions Code section 11350, and (2) the Court had misconstrued section 456(b) of the Social Security Act which precludes the discharge of a "debt which is a child support obligation assigned to a State." 42 U.S.C. §656(b). As to the first issue, the Ninth Circuit in *Visness* held that the statutory changes in the Bankruptcy Code did not affect its prior holding in *Ramirez* and, as to the second, it held that the panel hearing the matter was bound by the holding of the previous panel. Crucial to the analysis of *amicus* is the statement by the Ninth Circuit that "**(t)his panel is 'bound by decision of prior panels unless an en banc decision, Supreme court decision, or subsequent legislation undermines those decisions.'** " In re *Visness, supra,* at 57 F.3d 778 (bold type added). On July 25, 1995 the Ninth Circuit declined to grant a hearing en banc.

INTEREST OF AMICUS CURIAE

As the agency charged with the enforcement of child support in this political subdivision, the Office of the District Attorney of the County of Tulare represents the interests of the People of the State of California in collecting debts for child support which have been assigned to the county and in collecting support for custodial parents whose children are not receiving public assistance.[1] The district attorney of each county in California has similar responsibilities.[2] All district attorneys therefore have an immediate and significant interest in the dischargeability of debts in bankruptcy which are in the nature of support and assigned to the county.

Tulare County is a rural county in the State of California and is responsible for the administration of approximately 42,500 child support cases.[3] **In this caseload obligated parents owe approximately $21.6 million in uncollected judgments which are based on actions brought pursuant to California Welfare and Institutions Code § 11350.** This figure represents approximately 10.7 percent of the total collectible and unpaid support judgments in the district attorney's office which have been assigned to the county pursuant to section 402(a)(26) of the Social Security Act (42 U.S.C. § 602(a)(26)). It is judgments entered pursuant section 11350 that are dischargeable in proceedings brought under Title 11 of the United States Code.[4]

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1. California Welfare and Institutions Code §§ 11475.1, 11478.2.

2. California Welfare and Institutions Code § 11475.1.

3. A "case" may be defined simply as a support action for a family group consisting of a child (or children), a custodian, and an absent parent.

The *amicus curiae* brief of the City and County of San Francisco sets forth the point that in excess of one-half billion dollars of judgments for support are at risk of discharge under the decision below. *Amicus* joins in that assessment.

SUMMARY OF ARGUMENT

Amicus believes that the decision of the court below ignores the important public policy that support obligations should be exempt from bankruptcy discharge.

ARGUMENT

Amicus will be succinct. The decisions *In re Ramirez*, 795 F.2d 1497 (Ninth Cir., 1986) and of the court below, *In re Visness, 57 F.3d 775 (9th Cir., 1995)* ignore the strong public policy considerations that should prevent obligations in the nature of support from bankruptcy discharge. These concerns are best addressed by Justice O'Connor in *Rose v. Rose* 481 U.S. 619, 95 L.Ed. 2d 599, 107 S.Ct. 2029 (1987) as follows:

"Our Anglo-American tradition accords a special sanctity to the support obligation. Unlike other debts, for example, the obligation to support spouse and child is enforced on threat of

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4. *Amicus* notes that Welfare and Institutions Code § 11350 was amended effective January 1, 1992 to specify that the child support which forms the basis of the judgment is to be calculated pursuant to state child support guidelines as mandated by federal law. Welfare and Institutions Code § 11350(c); 42 U.S.C. § 667. The amendment further specifies that all amounts collected on the judgment in excess of the public assistance paid to the family shall be disbursed to the family. Welfare and Institutions Code § 11350(a)(2). *Amicus* declines to speculate as to the dischargeability of debts for child support entered pursuant this statute as amended.

contempt. These obligations, moreover, may not be discharged in bankruptcy. 11 U.S.C. § 523(a)(5). Indeed, even before the bankruptcy laws specifically excepted the support obligation from the discharge, this Court inferred such an exception, explaining the difference between a support obligation and other debts:

"We think the reasoning of [*Audubon v. Shufeldt*, 181 U.S. 575, 21 Sup.Ct. 735, 45 L.Ed. 1009 (1901)] recognizes the doctrine that a decree awarding alimony to the wife or children, or both, is not a debt which has been put in the form of a judgment, but is rather a legal means for enforcing the obligation of the husband and father to support and maintain his wife and children. He owes this duty not because of any contractual obligation or as a debt due from him to the wife, but because of the policy of the law which imposes the obligation upon the husband. The law interferes when the husband neglects or refuses to discharge this duty and enforces it against him by means of legal proceedings.

The obligation continues after the discharge in bankruptcy as well as before, and is no more than the duty devolved by the law upon the husband to support his children and is not a debt in any just sense. *Wetmore v. Markoe*, 196 U.S. 68, 74-76, 25 S.Ct. 172, 174-175, 49 L.Ed. 390 (1904)." *Rose* v. *Rose*, 481 U.S. 619, 637-638, 95 L.Ed. 2d 599, 615, 107 S.Ct. 2029, 2040 (1987) (Conc. Opn. of O'Connor, J.).

To paraphrase the Court in *Wetmore* v. *Markoe*, supra. Mr. Visness owes a duty to pay Contra Costa County because the County's judgment is a legal means of enforcing his obligation to support his family.

The court below directly contravened the policy stated above: **an absent parent who avoids service of process and delays the establishment of a formal court order is rewarded by the court below**, by being able to discharge his obligation in bankruptcy. This result is a highly inappropriate one.

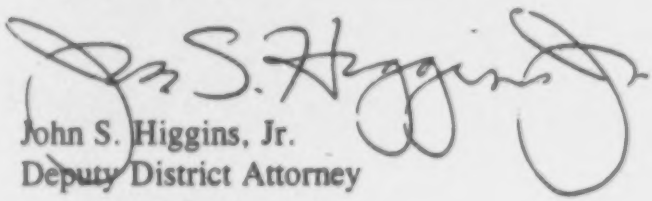
CONCLUSION

The District Attorney of the County of Tulare joins the Attorney General of the State of California and the District Attorney of the City and County of San Francisco in urging this Court to grant the Attorney General's petition for Writ of Certiorari.

Dated: November 22, 1995.

Respectfully submitted,

Phillip J. Cline
District Attorney of the County of Tulare



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Counsel for *Amicus Curiae*

Supreme Court, U.S.
FILED
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No. 95-664

In The
Supreme Court of the United States
October Term, 1995

COUNTY OF CONTRA COSTA,
Petitioner,

v.

DALE H. VISNESS,
Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

STATEMENT OF *AMICUS CURIAE* STATE OF MONTANA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rules 37.5 and 37.6 of the Rules of the Supreme Court of the United States, the Attorney General of the State of Montana files a Statement as *amicus curiae* and requests the Court to issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit filed on June 12, 1995.

STATEMENT OF *AMICUS CURIAE*

The Attorney General of the State of Montana joins in the argument of the District Attorney of the City and County of San Francisco and, for the reasons stated in his *amicus curiae* brief, urges the Court to issue a Writ of Certiorari to review the decision of the Court of Appeals for the Ninth Circuit filed in this matter.

Respectfully submitted,

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November 1995

No. 95-664

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

COUNTY OF CONTRA COSTA,
Petitioner

v.

DALE H. VISNESS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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25 pp

QUESTIONS PRESENTED

The Bankruptcy Code exempts from discharge a debt to a spouse or child for support that is "in connection with" an agreement or court order. 11 U.S.C. § 523(a)(5). When "such debts" are assigned to a county on receipt of AFDC, they are not exempt, unless the debts reflect rights "which have accrued at the time such assignment is executed," 42 U.S.C. §§ 602(a)(26), 656(b).

In California, even where no support obligation was established in connection with an agreement or order at the time of the assignment, and even though a county delays for three additional years before bringing an action to establish the support obligation, the county has a unique statutory cause of action for reimbursement that is retroactive to benefits paid while the county was delaying.

In this context, the petition for certiorari raises the following questions:

1. Did the appellate court correctly hold that the retroactive debt to the county is dischargeable under the plain meaning of the statutes?

2. When a county's delay in establishing a support obligation causes a multi-year retroactive judgment instead of current monthly payments, is the retroactive debt exempt from bankruptcy discharge?

3. Is review merited where the Court denied certiorari on the same issue nine years ago, and the petition asserts no further conflict?

4. Is certiorari appropriate where the petition depends upon a claim that a California appellate decision on state family law issues law is "wrong"?

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No. 95-664

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

COUNTY OF CONTRA COSTA,
Petitioner

v.

DALE H. VISNESS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondent Dale H. Visness respectfully submits this brief in opposition to the County of Contra Costa's petition for certiorari. Respondent requests that the Court deny the petition or, alternatively, clarify the federal principles and affirm that the retroactive debt is dischargeable in bankruptcy.

INTRODUCTION AND SUMMARY

Contra Costa County's petition for certiorari resurrects a narrow question of bankruptcy law for which this Court denied certiorari nine years ago. *In re Ramirez*, 795 F.2d 1494 (9th Cir. 1986), *cert. denied*, 481 U.S. 1003 (1987). The supposed "conflict" among circuits was illusory in 1986; and the county asserts no new or greater conflict today.

The Ninth Circuit's decision is correct as a matter of statutory interpretation, public policy and equity.

Under 11 U.S.C. § 523(a)(5), a debt to a spouse or child for support that is "in connection with" an agreement or order is exempt from discharge. When "such debts" are assigned upon receipt of Aid to Families with Dependent Children ("AFDC"), there is no exemption unless the assignment was pursuant to the Social Security Act. Such assignments, in turn, are limited to "rights to support ... which have accrued at the time such assignment is executed ...." 42 U.S.C. §§ 602(a)(26), 656(b).

Immediately upon receiving assignments of support rights in 1983 and 1985, the county had a unique statutory cause of action to establish Mr. Visness' support obligation. Cal. Welf. & Inst. Code § 11350. Prompt action would have resulted in a prospective order for manageable monthly payments. Instead, the county delayed.

With the three-year statute of limitations expiring, the county finally asserted its rights in 1987. But in addition

to the current payments, the county obtained a *retroactive* judgment for three years of benefits paid during the time that it had been sitting on its rights.

The Court of Appeals correctly held that the county's retroactive judgment is not within the plain literal terms of the bankruptcy discharge exemption. Clearly, the pre-1987 sums were not assigned debts for support "in connection with" an agreement or court order; and no such support rights had "accrued" at the time the assignment was executed.

The decision correctly addresses California family law within the framework of the Bankruptcy Code. When a spouse or child fails to establish a support obligation by agreement or court order, no right to retroactive support accrues under California law. As assignee of the Visness' support rights, the county has no greater claim to exemption under the Bankruptcy Code.

The county's retroactive judgment therefore is a creature of the unique statutory cause of action; it is not derived from assignment of any accrued right to support in connection with an agreement or court order. The retroactive judgment therefore is subject to the general bankruptcy policy of providing a "fresh start" -- not an exception that Congress has carefully and narrowly crafted.

Nor do public policies or equities support a departure from the statutory language. The county created its own difficulty by waiting until the limitations period was

expiring. Had it diligently established the support obligation, Mr. Visness could have made realistic monthly payments, rather than being overwhelmed by three years of retroactive debt.

Having effectively caused the bankruptcy, the county is in a poor equitable position to complain of the discharge.

The county seeks to avoid the plain meaning of the Bankruptcy Code by urging a strained reading of California family law. But the end-run fails because the state courts themselves have rejected that position.

At bottom, the California Attorney General argues to this Court that a California appellate decision on California family law, which the California Supreme Court declined to review, and in which the California Attorney General's own team of specialists was opposed only by a father appearing *in propria persona*, is "wrong law."

Respondent respectfully submits that certiorari should be denied. Alternatively, the Court may provide further guidance while affirming the principle that such retroactive debts are dischargeable in bankruptcy.

STATEMENT OF THE CASE

The county's statement of the case omits significant information and makes incorrect or misleading assertions.

First, it begins with a truncated view of 11 United States Code § 523(a)(5). Pet. at 3. The section does exempt from discharge a debt "to a spouse, former spouse, or child of

the debtor, for ... support" -- but only when that support is "*in connection with" an agreement or court order*. App. at 61.

The omitted qualification is significant to this case: no debt was or is owed to the spouse or child for support in connection with any agreement or court order.[1]

Second, the petition correctly states that AFDC recipients must assign accrued support rights to the county under 42 United States Code § 602(a)(26), i.e., § 402(a)(26) of the Social Security Act; and California Welfare & Institutions Code § 11350 gives the county a cause of action for reimbursement of AFDC benefits during separation. Pet. at 3.

But the county omits the related California law that refutes its position that this retroactive debt is among the assigned rights. As the Court of Appeals observed, a state appellate court has "refused to characterize a judgment obtained pursuant to ... § 11350 as an adjudication of a support obligation owed ... to the custodial parent or child." App. at 34, *In re Visness*, 57 F.3d 775, 779 (9th Cir. 1995). Instead,

> without a preexisting court decree establishing the non-custodial parent's support duty, there is no outstanding right to reimbursement for child

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[1] The county also cites § 523(a)(5)(B) for a broad assertion that "obligations in the nature of support are not dischargeable." Pet. at 21-23. The reference to "nature of support" merely qualifies the debts for support "in connection with" an agreement or order, which are the only debts within 523(a)(5). In other words, subsection (a)(5)(B) does not create a new or different class of exempt obligations.

> support. Accordingly, the [state] court determined that a judgment against a parent for reimbursement of AFDC benefits under section 11350 "enforces a duty to repay a statutorily created debt, not a duty owed to the spouse or child."

Id., quoting *Crider v. Superior Court*, 15 Cal.App.4th 227, 232-234 & n. 5, 18 Cal.Rptr. 757 (1993), *review denied, Cal. Sup. Ct.* (1993).

The Court of Appeal also quotes *In re Marriage of Goosmann*, 26 Cal.App.4th 838, 844, 31 Cal.Rptr. 613 (1994), which reiterates the "long-standing" rule that "'an order for child support only operates prospectively'" and "'a parent cannot claim reimbursement for money paid out in support of a child prior to an order directing the other parent to pay support.'" App. at 34-35, *In re Visness*, 57 F.3d at 779.

The county's rights *as assignee*, moreover, are no greater than those of the assignor. *In re Marriage of Smith*, 209 Cal.App.3d 196, 203-204, 257 Cal.Rptr. 47 (1989).

Once again, these omissions are significant. The "support rights" that are assigned to the county are to establish a *prospective* obligation and to obtain payments or arrearages *commencing with an agreement or court order*.

As the Court of Appeals determined, then, the retroactive debt to the county was created only by California statute; it is *not* an accrued support debt that the spouse or children assigned to the county within the language of the exemption.

Third, the county states that California law defines "support" as including amounts owing under § 11350. Pet. at

9, citing Cal. Family Code § 150, formerly Civil Code § 4390(h). But former § 4390 was not enacted until 1990, and the reference to § 11350 was added in 1992 -- long after the 1983 and 1985 assignments in this case. Cal. Stats. 1991, Chap. 110, § 5; Stats. 1989, Chap. 1359, § 1.

Fourth, the county and an *amicus curiae* (D.A. Cline) make unsupported and unfair disparaging references.[2] The county persists with that approach even though it previously acknowledged, "we do not claim or suggest that Mr. Visness' family fraudulently obtained AFDC," Appellant's Reply Brief at 13.

The record contains no hint of fraud or evasion. The county simply sat on its rights until September 1987, when the three-year statute of limitations already was expiring on benefits that began in March 1983. See Excerpts of Record 1A, 3A.

After the county finally established the support obligation, Mr. Visness has in fact paid the current monthly support. By delaying, however, the county caused an overwhelming retroactive liability that is beyond his limited ability to pay. Mr. Visness quite properly seeks refuge in

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[2] The county says, for example, it "eventually found" Mr. Visness, Pet. at 4; the ruling abets and encourages "welfare fraud and misuse of the bankruptcy remedy," *id.* at 5, 20; "absent parent who succeeds in keeping his whereabouts officially unknown," *id.* at 8; "finally found, he may escape his ... moral reimbursement duty by declaring bankruptcy," *id.* at 8. The *amicus* similarly asserts that an "absent parent who avoids service of process and delays ... is rewarded." *Amicus* (D.A. Cline) at 6 (emphasis omitted).

bankruptcy.

Finally, another *amicus curiae* (D.A. Smith) represents that "such parents" owe nearly five billion dollars in assigned support obligations and "by extrapolation" 11% of that sum is from § 11350 judgments "and consequently at risk of discharge in the Ninth Circuit." *Amicus* (D.A. Smith) at 2-5 & App. See also Pet. at 7, 20 (claiming that the decision causes "extreme financial harm to counties" [caps. omitted]).

The assertions have no evidentiary foundation. *Amicus* neither requests judicial notice nor cites any publication or report. Indeed, he acknowledges "California does not keep statistics" on judgments under § 11350. *Amicus* (D.A. Smith) at 4.

The unsupported "extrapolation" of such judgments is particularly misleading. Even assuming *arguendo* that the figures on § 11350 judgments are as claimed, they would lack relevance to this case. An unknown but probably large portion of such judgments involve debts that accrued after support was established by agreement or court order -- and which are *not at issue* in this case.

More to the point, whatever the actual retroactive debt may be, it is largely within the counties' own power to control. If they would promptly establish prospective support obligations under § 11350, the "retroactive" amounts that are "at risk of discharge" would be greatly reduced, if not eliminated altogether in the vast majority of cases.

REASONS FOR DENYING THE WRIT

I.

No Conflict Justifies Supreme Court Review

The county presents this case as perpetuating a conflict with the Seventh Circuit's decision in *In re Stovall*, 721 F.2d 1133 (7th Cir. 1983), App. at 56-60.

There was no conflict on the same issue during the October 1986 Term, when the Court denied certiorari in *In re Ramirez*, *supra*, 795 F.2d 1494, *cert. denied*, 481 U.S. 1003. And the county cites no authority for any more compelling claim in the intervening years.

In *Stovall* the aid began in 1974, and child support was established by a divorce decree in 1975. The father accumulated an arrearage "under the child support order" before filing for bankruptcy in 1982. App. at 56-57, 795 F.2d at 1344. In the Seventh Circuit's words,

> Appellant contends that this language [§ 602(a)(26)] refers only to the actual moneys that ... have accrued at the time of the assignment. Thus, in his view, all that is assigned pursuant to this statute are those sums *which are in arrears* at the time the aid recipient makes an assignment to the state agency.

App. at 58, 721 F.2d at 1135 (emphasis added).

The *Stovall* court rejected that view and concluded that "the full amount owed to the state pursuant to such an assignment is not dischargeable in bankruptcy." *Id.* But there is no suggestion in *Stovall* that the amount "owed" was other than the "arrearage ... under the child support order."

The county's petition nevertheless asserts: "Both cases expressly conflict with *In re Stovall*, 721 F.2d 1133 (7th Cir. 1983.)" Pet. at 7. The opinion below does not even mention *Stovall*. And in *Ramirez*, the Ninth Circuit confronted the supposed "conflict" and explained that none exists:

> The critical issue ... was whether Mr. Stovall would have to pay just the arrearage in support at the time of the assignment or also those support payments which accrued after assignment.... [O]n the facts of that case, the arrearage due at the time of assignment ... was arrearage accumulated "under the child support order."

In re Ramirez, 795 F.2d at 1498; but see *id.* at 1501 (dissent viewing *Stovall* as "addressing the same issue" and in "conflict").

The Seventh Circuit did not consider whether the discharge exemption encompasses reimbursement of benefits paid before any support obligation was established by agreement or court order. That is the issue before the Court in this case.

The county boldly re-writes *Stovall* to create a stronger illusion of a conflict. Yet nothing in that decision supports the county's representations that Mr. Stovall "conceded ... that the post-order arrearages were not dischargeable" and that "he sought discharge of the AFDC reimbursement amount accrued before the 1975 court order for support," Pet. at 7. To the contrary, he plainly contested the arrearages "under the support order"; and the decision does not indicate whether the state's claim included the pre-divorce benefits. See generally, App. at 56-58, 721 F.2d at 1134-1135.

The issue today is essentially the same as when this Court denied certiorari in 1987.[3] Respondent respectfully submits that there is no conflict, and this petition similarly should be denied.

II.

The Court of Appeals Correctly Holds That Retroactive Reimbursement Of AFDC Benefits Is Dischargeable

The Ninth Circuit correctly held that a retroactive judgment under § 11350 is dischargeable. Such debts are neither owed "to" the spouse or children nor assigned by them to the county. As the Ninth Circuit concluded,

> Because Mr. Ramirez's debt to the County arose from the operation of this statute and not from any right assigned by Mrs. Ramirez, the debt falls outside the scope of § 602(a)(26) and therefore is not subject to the nondischargeability provision of § 656(b).

795 F.2d at 1498; accord, *In re Visness*, App. at 37-38, 57 F.3d at 781.

The holding and reasoning are based squarely upon the language of the federal statutes. 11 U.S.C. § 523(a)(5) only exempts debts that are "to" the spouse or child for support "in connection with" an agreement or court order, as well as

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[3] *In re Stovall* was decided without oral argument; and no petition for certiorari was filed. In the ensuing 12 years, Shephard's Citations shows only two court of appeals decisions citing the case -- *Ramirez* and *In re Seibert*, 914 F.2d 102, 104 (7th Cir. 1990). In *Seibert*, a "county waived its right to collect past due child support ...." That case did hold that pregnancy and medical expenses and court costs in paternity actions are not discharged. Although such expenses arguably have similarities to retroactive support, the county has not asserted a conflict on any basis other than *Stovall*.

"such debts" when they are assigned pursuant to 42 U.S.C. § 602(a)(26). The rights that are assigned under § 602, in turn, are only those "rights to support ... which have accrued at the time such assignment is executed." See App. at 61, 63.

The county would disregard § 523(a)(5)'s limitations. It interprets "accrued at the time such assignment is executed" as broadly encompassing all rights to support "from birth" -- regardless of whether any obligation had been established by agreement or court order at the time of execution.

But that all-inclusive interpretation would render the term "accrued" superfluous, and the phrase "at the time such assignment is executed" would be meaningless. As the district court observed in this case, the county's position "would mean that "every AFDC/Bankruptcy case would result in a nondischargeable debt," which the court considered an unduly "drastic step." App. at 54.

This Court rejected a similar argument in *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552 (1990), which held that criminal restitution orders are dischargeable under Chapter 13. After noting that the analysis begins with the literal language of the statute, the Court expressed "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." 495 U.S. at 557-558, 562.

Under similar principles of construction, construing "accrued at the time such assignment is executed" as meaning

"from birth" is not likely to reflect Congress' intent.

A more logical approach would harmonize the interrelated provisions of the Bankruptcy Code and Social Security Act. Both 11 U.S.C. § 523(a)(5) and 42 U.S.C. § 656(b) limit the county's exemption to debts which were "assigned" pursuant to § 602(a)(26). The reference to "accrued" rights in § 602, then, would refer to those established rights that are within § 523(a)(5). That is, "accrued" rights are those for support "in connection with" an agreement or court order.

No countervailing justification appears for the assertion that "accrued at the time such assignment is executed" includes a retroactive judgment for earlier benefits.

As noted above, under California law, there is no right to "retroactive" support. *Crider v. Superior Court, supra*, 15 Cal.App.4th at 232-234; *In re Marriage of Goosmann, supra*, 26 Cal.App.4th at 844. And the county, as assignee, acquires no greater rights than were possessed by the assignor. *In re Marriage of Smith, supra*, 209 Cal.App.3d at 203-204.

The Court of Appeals correctly held, then, that the county's retroactive judgment was derived solely from § 11350, and consequently is not within the statutory exemption from discharge. *In re Ramirez*, 795 F.2d at 1498.[4]

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[4] The Ninth Circuit "assumed without deciding," that a § 11350 reimbursement order could be an "order of a court" within the meaning of § 523(a)(5). App. at 37, 57 F.3d at 780. But § 11350 establishes a debt "to the county," not "to a spouse, former spouse or child" -- which is the type of debt that must be "in connection with" such an agreement or order under § 523(a)(5).

On the other hand, should this Court grant certiorari, respondent respectfully submits that an appropriate resolution would affirm the principle that retroactive judgments for AFDC prior to establishing the support obligation by agreement or court order are not exempt from discharge.

The Court may wish, for example, to make it clear that further amendments to state law will not change the result. See, e.g., *Citizens Bank of Maryland v. Strumpf*, ___ U.S. ___, 116 S.Ct. 286, 289 (Oct. 31, 1995) (federal, not state law governs construction of the bankruptcy laws). It is the literal language of the federal statutes, not the peculiarities of state law, that makes these retroactive judgments dischargeable.

III.

The Policies And Equities Support Discharge Of The Retroactive Debt

The decisions allowing discharge are not only correct; they are the proper result based upon public policy and equity.

This Court has a "longstanding tradition of reading the Bankruptcy act with an eye to its fundamental purpose -- the rehabilitation of bankrupts. This has [nearly] always led the Court ... to construe narrowly any exceptions to the general discharge provisions. *United States v. Sotelo*, 436 U.S. 268, 285-286 (1978) (Rhenquist, C.J., dissenting for 4 justices), citing *Gleason v. Thaw*, 236 U.S. 558, 562 (1915).

The principle and underlying policy of rehabilitation are

fully applicable here.

Until the support obligation is established by judgment, order or agreement, a number of pertinent issues remain uncertain. They include *inter alia* paternity, ability to pay, and the amount of support.

Where no support obligation is established at the time of assignment, the county should be encouraged to take that step promptly. Everybody benefits when the fact and the amount of a prospective obligation are quickly established. The noncustodial parent can manage realistic monthly payments, or alternatively, the county may garnish wages or take other action to limit any arrearage.

By contrast, when the county sits on its rights during the three-year limitations period, the result often will be precisely what occurred here. The multi-year retroactive judgment is overwhelming for the parent. It leaves little alternative to bankruptcy. See also *Ramirez*, 795 F.2d at 1499 ("mindful of the centrality of equitable concerns in all bankruptcy decisions," the "overriding goal is to leave Mr. Ramirez in a position to meet his current obligations to support his children").

And contrary to the county's allusion, a properly sought refuge in bankruptcy violates no "moral duty," Pet. at 8.

The opinion below, as did *Ramirez*, serves an important function by informing prosecutors that delays in establishing support rights carry the risk of discharge in bankruptcy.

The county and its *amici* appear oblivious to the practical and human consequences of their delay in establishing the support obligation. They argue instead that exemption from discharge is necessary to combat "welfare fraud" and bankruptcy "abuse." Pet. at 5, 20; *Amicus* at 4-6; see also n. 2, *supra*. But as noted *supra*, there is no evidentiary support for such claims in this case.

Had there truly been any fraud, the state could have prevented discharge on that basis under § 523(a)(2)(A). *Field v. Mans*, ___ U.S. ___, 116 S.Ct. 437, 440-441 (Nov. 28, 1995). And if criminal conduct were involved, the state could have secured a restitution order as a condition of probation. In this proceeding under Chapter 7, such a restitution order would be exempt under § 523(a)(7). *Kelly v. Robinson*, 479 U.S. 36, 50 (1986); compare *Davenport, supra*, 495 U.S. at 555 (holding restitution orders are dischargeable under the different language governing Chapter 13).

Even if a parent evades location or service, the county may file immediately and utilize a number of investigative and procedural weapons to minimize any need for retroactive relief. See, e.g., *Ramirez*, 795 F.2d at 1495 (judgment by default after noncustodial spouse failed to appear).[5]

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[5] *Amicus* Smith asserts that an action must be filed within 45 days of "locating" the parent, and appears to suggest that earlier filing is improper or wasteful. *Amicus* at 6 n. 7, citing 45 C.F.R. § 303.5(a)(1). But the cited regulation merely says the agency must "[p]rovide an absent father the opportunity to voluntarily acknowledge paternity ...." It neither restricts nor delays the agency's options.

Prosecutors of such cases, at least in California, tend to be specialists wielding the full power of the state. By contrast, the parents of AFDC recipients often lack legal representation or the ability otherwise to assert available defenses. As in this case, a parent may stipulate to the full amount demanded, regardless of whether he or she would have been able or ordered to pay, that level of support.[6]

Because the county is likely to garnish wages, moreover, the noncustodial spouse may be unable to meet current obligations and therefore seek refuge in bankruptcy. Having caused that very result, the county is in a poor equitable position to assert that its retroactive debt cannot be discharged.

Finally, we note the arguments of the two *amici curiae*. The brief by District Attorney Smith (from San Francisco) asserts huge sums that are unsupported by the record; it does not even suggest a basis for judicial notice. *Amicus* at 3-5. Even assuming *arguendo* that the numbers had evidentiary value, they are meaningless in the context of this case. To be relevant, the statistics must state amounts that are at issue -- the "retroactive" debt for payments made before any agreement or order. *Amicus* makes no attempt to provide such

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[6] An irregularity in this case illustrates the potential for prosecutors taking unfair advantage. The county acknowledges a three-year statute of limitations. Pet. at 11 n. 5. Yet it secured a "stipulated order" for reimbursement of AFDC beginning September 1, 1984 -- more than three years prior to the complaint filed September 16, 1987. Excerpts of Record 2A, 2B.

figures.

Most importantly, however, any financial consequences from Court of Appeals' rule are largely within the counties' own control.

The *amicus curiae* brief by District Attorney Cline (from Tulare County) largely copies the Smith brief. Its only new substance is a quotation from Justice O'Connor's concurring opinion in *Rose v. Rose*, 481 U.S. 619, 637-638 (1987) (discussing nondischargeability of true support debts).

But that excerpt supports our position. Justice O'Connor speaks of a duty to support one's spouse and children, "'a decree awarding alimony'" and enforcement "'by means of legal proceedings.'" The language does not suggest that the same policies would exempt a debt to the county, where no support duty had been established by agreement, decree or other legal proceedings.

An established obligation to a spouse or child simply cannot be compared with a retroactive debt to a county. Mr. Visness has paid and intends to continue paying the current monthly support amounts. They are not at issue here.

In any event, the counties' pleas of bad policy and financial hardship are unavailing. In *Davenport*, the Court "refus[ed] to carve out a broad judicial exception to discharge ...." 495 at 563. While recognizing that discharges may hamper state criminal judges and create burdens for state prosecutors, the Court concluded:

> Nonetheless, the concerns ... cannot justify rewriting the Code to avoid federal intrusion. Where, as here, congressional intent is clear, our sole function is to enforce the statute according to its terms.

Id.

Similarly, even if the county's complaints could be persuasive, they would not justify a judicial exception to discharge or rewriting the Bankruptcy Code.

IV.

Certiorari Is Inappropriate When The Petition Hinges On Claims That State Decisions On State Law Are "Wrong"

Review on certiorari would be inappropriate for another reason. The county argues that a recent California appellate decision interpreting § 11350 should be disregarded by this Court. Specifically, *Crider v. Superior Court, supra*, 15 Cal.App.4th 227 is "a classic example of bad facts making wrong law." Pet. at 13-15 (also criticizing the state court as having "misstated" California law).

The argument is at best curious. In *Crider*, the same team of specialists from the California Attorney General's office was opposed by a father who appeared *in propria persona*. With the field virtually to themselves, they not only were unable to avert the supposedly "wrong law"; they also failed to correct the "error" on a petition for rehearing -- and on a petition for review by the California Supreme Court as well.

Respondent respectfully submits that certiorari is

inappropriate when the petition depends upon this Court concluding that the state's own appellate decisions are "wrong" on the underlying state law.

CONCLUSION

Respondent Dale Visness respectfully submits that the petition for writ of certiorari should be denied. Alternatively, respondent requests that the Court clarify the applicable federal principles and affirm the judgment of the Court of Appeal that the retroactive judgments in this case are dischargeable in bankruptcy.

Date: December 26, 1995

Respectfully submitted,

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